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CHEVRON DEFERENCE AND FOREIGN AFFAIRS

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INTRODUCTION

One of the most difficult issues in foreign affairs law is the proper relationship between the judicial and executive branches. On the one hand, as Chief Justice John Marshall famously stated, it is “the province and duty of the judicial department to say what the law is.”¹ It is not self-apparent from constitutional text or structure that this “province and duty” should be limited to domestic cases. On the other hand, the executive branch has special expertise and authority in foreign affairs, and excessive judicial intervention in this area might impede the nation’s ability to act effectively in the international community. To the dismay of many academic commentators, courts generally have resolved this tension by giving substantial and sometimes absolute deference to the executive branch in foreign affairs cases. The dismayed commentators typically frame this issue as a choice between two extremes: either the courts in foreign affairs cases enforce the “rule of law” against the Executive or they abdicate their judicial function. This view could be called the “*Marbury* perspective.”²

The *Marbury* perspective has significant appeal. As episodes like the escalation of the Vietnam conflict, the Iran-Contra funding scandal, and various United States government-sponsored abductions demonstrate, foreign affairs law seems particularly subject to executive branch abuse. Moreover, the Supreme Court’s explanations for deference in this area have been characterized by sweeping and unconvincing generalities, such as its description of the executive branch as the “sole organ of the federal government

¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

² For examples of this view, see Thomas M. Franck, *Political Questions / Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* 4–5 (1992); Michael J. Glennon, *Constitutional Diplomacy* 313–21 (1990); Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* 148 (1990); David Gray Adler, *Court, Constitution, and Foreign Affairs*, in *The Constitution and the Conduct of American Foreign Policy*, 19–20 (David Gray Adler & Larry N. George eds., 1996); and Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 *Am. J. Int’l L.* 805, 813 (1989).

in the field of international relations.”³ Its explanations also have relied too heavily on a bright-line distinction between “foreign” and “domestic”—a distinction that appears increasingly less tenable in this age of globalization.

There are nevertheless reasons to question the *Marbury* perspective. First, its insistence on a pure “rule of law” approach seems unrealistic. Courts have given deference to the executive branch in foreign affairs matters throughout the nation’s history,⁴ and cries of “judicial abdication” are unlikely to change that. To put it differently, the *Marbury* perspective fails to distinguish between legitimate and illegitimate reasons for deference. Second, the *Marbury* perspective fails to distinguish among types of deference. “Deference” in foreign affairs cases can mean a variety of propositions, ranging from the weight given to an argument based on its persuasive power, to acceptance of the executive branch’s views of international facts, to judicial abstention under the political question doctrine. Even if some forms of deference are improper, others may not be. Third, the *Marbury* perspective fails to distinguish among types of foreign affairs law. Foreign affairs law consists of a mix of constitutional law, federal statutory law, international law (both treaty-based and customary), executive branch-made law, and federal common law. The propriety of deference may well vary depending on the type of law at issue.

In this Article, I suggest a different way of thinking about this issue of foreign affairs deference, which I will call the “*Chevron* perspective.” Much can be gained, I argue, by considering foreign affairs law from the perspective of the *Chevron* doctrine in administrative law.⁵ Under this doctrine, courts will defer to an agency’s interpretation of an ambiguous statute if the agency has been charged with administering the statute and the agency’s interpretation is based on a “permissible” reading of the statute.⁶ The precise

³ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

⁴ In this regard, it is worth recalling that it was John Marshall, the author of *Marbury*, who (as a Congressman) first described the executive branch as the “sole organ” of the United States in foreign affairs. See 10 *Annals of Cong.* 613 (1800); see also Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 *Yale L.J.* 229, 347–51 (1990) (discussing the context of Marshall’s statement).

⁵ The doctrine is named after *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

⁶ *Id.* at 843.

contours and implications of this doctrine are hotly debated among courts and commentators. The Supreme Court has made clear, however, that deference is proper when there are certain formal and functional justifications for presuming that the executive branch has been delegated lawmaking power. When such justifications are present, the *Chevron* doctrine holds that deference to the executive branch concerning the meaning of law is *not* an abdication of judicial duty. For this reason, the *Chevron* doctrine has been described as “a kind of *Marbury*, or counter-*Marbury*, for the administrative state.”⁷

In addition to providing a theoretical alternative to the *Marbury* perspective, the *Chevron* doctrine has direct practical significance to foreign affairs law. The global economy, proliferation of multilateral treaties, and increasing overlap between domestic and international law have meant that our administrative state—to which the *Chevron* doctrine was a response—is becoming to some extent an *international* administrative state. A wide variety of administrative agencies now confront foreign affairs issues, such as whether to comply with international law,⁸ whether to apply federal regulations to foreign conduct,⁹ and whether and how to incorporate the decisions of international institutions.¹⁰ Moreover, as some courts are beginning to recognize, the *Chevron* doctrine may have relevance to statutory foreign affairs issues outside the agency context,¹¹ as well as to non-statutory foreign affairs law,

⁷ Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2075 (1990).

⁸ See, e.g., *Federal Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995) (reviewing the Commerce Department's method for determining antidumping margins in light of requirements in the General Agreement on Tariffs and Trade).

⁹ See, e.g., *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256–58 (1991) (considering the Equal Employment Opportunity Commission's view that Title VII applied to discriminatory conduct outside the United States).

¹⁰ See, e.g., *George E. Warren Corp. v. EPA*, 159 F.3d 616 (D.C. Cir. 1998), amended by 164 F.3d 676 (D.C. Cir. 1999) (reviewing regulations promulgated by the Environmental Protection Agency in response to a ruling by the dispute settlement body of the World Trade Organization). I do not consider here the interesting but separate issue of the degree of deference that international institutions should accord national governments in their interpretation of international obligations. See, e.g., Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 Am. J. Int'l L. 193 (1996).

¹¹ For example, *Chevron* may be relevant to statutory delegations of authority to the executive branch as a whole. See *infra* text accompanying notes 138–145.

such as treaty law.¹² This trend is consistent with the general “domestication” of foreign affairs law that I have argued for in other writings.¹³

The Article proceeds in five parts. Part I provides some of the background needed for subsequent parts of the paper. It describes the relationship between the executive branch and international law, sets out a typology of foreign affairs deference, and considers the explanations for and criticisms of broad foreign affairs deference. Part II discusses the nature of *Chevron* deference, its potential relevance to foreign affairs law, and its general relationship with canons of construction. Part III examines special issues that arise when the *Chevron* doctrine is applied to statutory foreign affairs law, in particular the relationship between *Chevron* deference and two foreign-affairs-related canons of construction. Part IV considers why courts have historically given what is in effect *Chevron* deference to the executive branch’s interpretation of international law, and concludes that the answer differs between treaty law and customary international law. Part V explains why *Chevron* deference (as well as certain other forms of deference) is not appropriate today with respect to two federal common law doctrines relating to foreign affairs—the act of state doctrine and the doctrine of dormant foreign affairs preemption.

To avoid confusion (and stave off some potential objections), I should make clear at the outset what I am *not* attempting to do in this Article. I am not attempting to present a complete defense of *Chevron* as a development in administrative law. Regardless of how well justified *Chevron* is on its own terms, my argument is that the *Chevron* perspective provides useful insights in the area of foreign affairs law. Nor do I attempt here to determine the proper scope of the President’s foreign affairs powers. I do assume

¹² See, e.g., *More v. Intelcom Support Servs.*, 960 F.2d 466, 471–72 (5th Cir. 1992) (deferring to the Department of Defense’s interpretation of a treaty with the Philippines).

¹³ See, e.g., Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L.J. 479 (1998) (arguing that the canon of construction concerning conflicts with international law should be viewed in domestic separation-of-powers terms) [hereinafter Bradley, *Charming Betsy Canon*]; Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390 (1998) (arguing that domestic federalism considerations are relevant to the treaty power) [hereinafter Bradley, *Treaty Power*].

throughout the Article that, consistent with current case law, the President has some independent lawmaking powers in the foreign affairs area, but that assumption is not critical to my overall analysis. Finally, I make no effort to determine the proper scope of the nondelegation doctrine. Current Supreme Court precedent gives little content to the doctrine, but there has been renewed academic support for it, and it is possible that the Supreme Court will revitalize it at some point.¹⁴ The scope of the nondelegation doctrine might affect the resolution of some of the specific issues discussed in this Article, but, again, it is not critical to the overall analysis.

I. INTERNATIONAL LAW, DEFERENCE, AND THE *MARBURY* PERSPECTIVE

This Part lays some of the groundwork for the rest of the Article. I begin by briefly describing the relationship between the executive branch and international law. Next, I describe various types of foreign affairs deference. Finally, I describe the standard critique of broad foreign affairs deference and highlight several deficiencies in the critique.

A. *The Executive Branch and International Law*

Foreign affairs law consists of not only domestic law but also international law. Because international law poses special deference issues, it is worth considering at the outset the legal relationship between this type of law and the executive branch. The two principal types of international law are treaties and customary international law. Treaties are “purposeful agreement[s]” among

¹⁴ For a recent discussion of this topic, see Symposium, *The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives*, 20 *Cardozo L. Rev.* 731 (1999). The Supreme Court has not invalidated a federal statute based on the nondelegation doctrine since 1935. Cf. *Mistretta v. United States*, 488 U.S. 361, 373–74 (1989) (rejecting a nondelegation challenge to the Federal Sentencing Guidelines). For a recent lower court decision applying the nondelegation doctrine, see *American Trucking Ass’n v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) (per curiam), cert. granted sub nom. *Browner v. American Trucking Ass’n*, 2000 U.S. LEXIS 3577 (May 22, 2000). See also Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 *Mich. L. Rev.* 303, 309 (1999) (arguing that the *American Trucking* decision “announces the birth of a new nondelegation doctrine”).

nations.¹⁵ Under United States law, there is a further distinction between “Article II treaties,” which require two-thirds senatorial advice and consent, and less formal “executive agreements,” which do not. Customary international law, by contrast, is the law of the international community that “results from a general and consistent practice of states followed by them from a sense of legal obligation.”¹⁶ On the international plane, customary international law has essentially the same binding force on nations as treaty law.¹⁷

There is much debate and uncertainty concerning the relationship between these forms of law and the executive branch. The following is a brief overview of the current state of the law.

1. Self-Executing Treaties

The Supreme Court has long distinguished between “self-executing” and “non-self-executing” treaties.¹⁸ Self-executing treaties are considered part of the “supreme Law of the Land” referred to in Article VI of the Constitution,¹⁹ and they presumably are also part of the “Laws” referred to in Article II’s Take Care Clause.²⁰ As a result, it is quite possible that the executive branch is bound by self-executing treaties that have not been terminated, just as it is bound by other extant federal law.²¹ Whether the executive branch

¹⁵ Restatement (Third) of the Foreign Relations Law of the United States, introductory note at 18 (1987) [hereinafter Restatement (Third)].

¹⁶ Id. § 102(2).

¹⁷ Id. § 102 cmt. j.

¹⁸ See, e.g., *Terlinden v. Ames*, 184 U.S. 270, 288 (1902); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). See generally Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int’l L. 695 (1995) (discussing in detail the distinction between self-executing and non-self-executing treaties).

¹⁹ U.S. Const. art. VI, cl. 2 (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

²⁰ Id. art. II, § 3 (stating that the President “shall take Care that the Laws be faithfully executed”).

²¹ In a recent application of this principle, the Federal Court of Claims invalidated a regulation of the Internal Revenue Service because of a conflict with a self-executing tax treaty between the United States and Great Britain. See *National Westminster Bank, PLC v. United States*, 44 Fed. Cl. 120, 131 (1999). See also, e.g., *Cook v. United States*, 288 U.S. 102, 118–19 (1933) (holding that a self-executing liquor treaty limited the authority of the Coast Guard to board vessels). Cf. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (assuming that executive branch violation of a self-executing extradition treaty might provide a basis for dismissing a criminal prosecution). Of course, a court’s

has the power to unilaterally *terminate* a treaty (and thereby avoid the domestic-law obligation to comply with it) has not been resolved.²²

2. *Non-Self-Executing Treaties*

Courts vary to some extent in the precise test they use to determine whether a treaty is self-executing.²³ Typically, courts consider a variety of factors, such as the treaty's language and purpose, the nature of the obligations that it imposes, and the domestic consequences associated with immediate judicial enforcement.²⁴ In recent years, some courts have applied what appears to be a presumption *against* self-execution.²⁵ Whatever the test, if a treaty is found to be non-self-executing, it will not be judicially enforceable until implemented by Congress.²⁶ As a result, non-self-executing treaties, *a fortiori*, would not seem to be judicially enforceable against the Executive. And, indeed, there are a number of lower court decisions to that effect.²⁷

determination of whether a treaty has in fact been violated may be influenced by whether the court defers to the executive branch's interpretation of the treaty. For a discussion of that interpretation issue, see *infra* Part IV.A.

²² The Supreme Court was faced with this issue in *Goldwater v. Carter*, 444 U.S. 996 (1979), but four Justices concluded that the issue was non-justiciable under the political question doctrine and another Justice concluded that the issue was not ripe, so the Court did not reach the merits. See *id.* at 997, 1002. See also Louis Henkin, *Foreign Affairs and the United States Constitution* 211 (2d ed. 1996) ("[T]he Constitution tells us only who can make treaties for the United States; it does not say who can unmake them.").

²³ See Vázquez, *supra* note 18. For a thorough discussion of the Founding history relevant to the self-execution issue, see John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum. L. Rev. 1955 (1999).

²⁴ See, e.g., *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985); *United States v. Postal*, 589 F.2d 862, 877 (5th Cir.), cert. denied, 444 U.S. 832 (1979); *People of Saipan v. United States Dep't of Interior*, 502 F.2d 90, 97 (9th Cir. 1974).

²⁵ See Curtis A. Bradley, *Breard*, Our Dualist Constitution, and the Internationalist Conception, 51 Stan. L. Rev. 529, 541 n.62 (1999) (citing cases).

²⁶ See Restatement (Third), *supra* note 15, § 111(3) ("[A] 'non-self-executing' agreement will not be given effect as law in the absence of necessary implementation.").

²⁷ See, e.g., *Postal*, 589 F.2d at 875-76; *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976).

3. *Executive Agreements*

Executive agreements are, quite simply, international agreements concluded by the Executive without resort to the Article II senatorial consent process. Frequently, Congress authorizes such agreements (in advance or after the fact), in which case they are referred to as “congressional-executive agreements.” In some instances, the Executive enters into international agreements without any congressional involvement, in which case they are referred to as “sole executive agreements.” Although the legitimacy of executive agreements has been questioned by some commentators,²⁸ the Supreme Court has upheld them in a number of decisions.²⁹ The Court has not, however, identified the limits of the Executive’s power to enter into such agreements. Whatever their proper scope, it seems likely that the Executive has the power to override sole executive agreements; such agreements, after all, stem from the Executive’s own powers. Congressional-executive agreements, by contrast, take the form of federal statutes, and they may be binding on the President as such, at least until the international agreement is terminated. As with formal treaties, it is not clear whether the President has the unilateral power to terminate congressional-executive agreements.³⁰

4. *Customary International Law*

There has been much academic debate over whether the executive branch is bound by customary international law.³¹ The commentators who argue that the Executive is bound rely on the proposition that customary international law has the status in the United States legal system of self-executing federal law, a proposition that Professor Jack Goldsmith and I have termed the “modern

²⁸ The most prominent recent critic of executive agreements is Laurence Tribe. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221 (1995). The most prominent earlier critic was Edwin Borchard. See Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 Yale L.J. 664 (1944).

²⁹ See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981); *United States v. Pink*, 315 U.S. 203, 230 (1942); *United States v. Belmont*, 301 U.S. 324, 331 (1937).

³⁰ See Henkin, *supra* note 22, at 496 n.159.

³¹ See, e.g., *Colloquy, Agora: May the President Violate Customary International Law?*, 80 Am. J. Int’l L. 913 (1986); *Colloquy, Agora: May the President Violate Customary International Law? (Cont’d)*, 81 Am. J. Int’l L. 371 (1987).

position.”³² Because of this status, the argument goes, customary international law is part of the “supreme Law of the Land” referred to in Article VI of the Constitution and also part of the “Laws” that the President is obligated under Article II to “take Care . . . [are] faithfully executed.”³³

The arguments for and against the modern position have been extensively discussed in other writings, so I will not recite them here. For present purposes, it is simply worth noting two points. First, the constitutional text provides little support for the modern position. The Supremacy Clause includes treaties in its list of the “supreme Law of the Land” but does not mention customary international law.³⁴ Similarly, Article III states that the judicial power of the federal courts extends to cases arising under treaties but does not refer to cases arising under customary international law.³⁵ The only reference in the Constitution to customary international law (termed the “law of nations” at the time of the Founding) is a grant of statutory power to Congress.³⁶ Although “Laws” in Article II is left undefined, there is little reason to believe that it was intended to be broader than both the “supreme Law of the Land” in the Supremacy Clause and the “arising under” categories in Article III.³⁷ I will return to these textual points later in the Article.

³² See Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 816 (1997).

³³ For arguments to this effect, see, for example, Michael J. Glennon, Raising *The Paquete Habana*: Is Violation of Customary International Law by the Executive Unconstitutional?, 80 Nw. U. L. Rev. 321, 348–58 (1985); Jules Lobel, The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law, 71 Va. L. Rev. 1071, 1116–20 (1985); and Jordan J. Paust, The President *Is* Bound by Customary International Law, 81 Am. J. Int’l L. 377, 382 (1987). Some proponents of the modern position reject the conclusion that customary international law binds the Executive, but they do not typically explain why the Take Care Clause is inapplicable in this situation.

³⁴ See U.S. Const. art. VI, cl. 2.

³⁵ See U.S. Const. art. III, § 2, cl. 1.

³⁶ See U.S. Const. art. I, § 8, cl. 10 (giving Congress the power to “define and punish . . . Offences against the Law of Nations”).

³⁷ Although the Founders might well have believed that federal courts would apply customary international law in some cases, the word “Laws” in Article II surely was not intended to refer to all law that might be applied by the federal courts; otherwise the President would be constitutionally obliged to faithfully execute *state* law and even *foreign* law (both of which can be applied by federal courts), which no one contends. Cf. *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982) (stating that the President

Second, proponents of the modern position typically argue that the federal-law status of customary international law is well supported by contemporary judicial decisions. Most such proponents, at least when pressed, concede that courts did not historically treat customary international law as supreme federal law.³⁸ They argue, however, that the modern position is now broadly supported by Supreme Court and lower court decisions.³⁹ In the past, I have pointed out a number of areas of United States law that in fact seem inconsistent with the modern position.⁴⁰ In considering the various deference doctrines in this Article, I highlight additional examples.⁴¹

B. Foreign Affairs Deference

Judicial deference to the executive branch in the area of foreign affairs is hardly a new phenomenon. Since early in the nation's history, courts have been reluctant to contradict the executive branch in its conduct of foreign relations. This deference is often treated by commentators as a unitary phenomenon. In fact, it involves a variety of situations, corresponding roughly to five overlapping categories.

1. Political Question Deference

Courts often have given absolute deference to the executive branch on foreign affairs issues, labeling these issues "political

is charged under the Take Care Clause with "the enforcement of *federal law*") (emphasis added).

³⁸ See, e.g., Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1557–59 (1984); Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824, 1830–33 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L. Rev. 371, 373–74 (1997). But see Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 Mich. J. Int'l L. 301, 301 (1999).

³⁹ See, e.g., Henkin, *supra* note 38, at 1559–60; Koh, *supra* note 38, at 1824–25; Neuman, *supra* note 38, at 378.

⁴⁰ A few commentators otherwise sympathetic to the modern position have conceded this point. See, e.g., Thomas M. Franck, *Dr. Pangloss Meets the Grinch: A Pessimistic Comment on Harold Koh's Optimism*, 35 Hous. L. Rev. 683, 695–96 (1998); Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 Harv. L. Rev. 1785, 1811 (1997).

⁴¹ See *infra* text accompanying notes 57, 223, 243, 263 & 308.

questions.”⁴² As Professor Louis Henkin has noted, this label does not necessarily mean that the issue is considered nonjusticiable. Instead, in many “political question” cases, courts are simply holding “that the President’s decision was within his authority and therefore law for the courts.”⁴³ For example, the Supreme Court has labeled as “political” the issue of whether, after a change of conditions, a foreign nation continues to remain a party to a treaty, but the Court has not treated the issue as non-justiciable; rather, it has accepted as legally binding the executive branch’s determination of the issue.⁴⁴ Nevertheless, there are instances of non-justiciable political questions in the foreign affairs area, especially in the lower courts.⁴⁵ Indeed, although this “pure” version of the political question doctrine has waned substantially in recent years as a general matter, it still appears to have some force in the foreign affairs area.⁴⁶

⁴² See Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 *Yale L.J.* 597, 610–612 (1976). See also Edwin D. Dickinson, *International Political Questions in the National Courts*, 19 *Am. J. Int’l L.* 157 (1925) (discussing examples of international issues that have been deemed political questions).

⁴³ Henkin, *supra* note 42, at 612.

⁴⁴ See, e.g., *Terlinden v. Ames*, 184 U.S. 270, 288 (1900); *Mingtai Fire & Marine Ins. Co. v. UPS*, 177 F.3d 1142, 1145 (9th Cir.), cert. denied, 120 S. Ct. 374 (1999); *Then v. Melendez*, 92 F.3d 851, 854 (9th Cir. 1996).

⁴⁵ For example, a number of lower courts invoked the political question doctrine in refusing to adjudicate challenges to U.S. involvement in the Vietnam conflict. See, e.g., *Mitchell v. Laird*, 488 F.2d 611, 616 (D.C. Cir. 1973); *Massachusetts v. Laird*, 451 F.2d 26, 33 n.12 (1st Cir. 1971); *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir.), cert. denied, 404 U.S. 869 (1971). For more recent decisions finding issues relating to U.S. military activities to be nonjusticiable political questions, see, for example, *Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997), cert. denied, 522 U.S. 1045 (1998); *Tiffany v. United States*, 931 F.2d 271, 278–79 (4th Cir. 1991), cert. denied, 502 U.S. 1030 (1992); and *Crockett v. Reagan*, 720 F.2d 1355, 1356–57 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984).

⁴⁶ See Peter W. Low & John C. Jeffries, Jr., *Federal Courts and the Law of Federal-State Relations* 444 (4th ed. 1998) (“Though successful resort to the political question doctrine in purely domestic disputes is rare, the doctrine appears to have greater vitality in foreign affairs.”). In *Goldwater v. Carter*, 444 U.S. 996 (1979), for example, four Supreme Court Justices expressed the view that the President’s constitutional authority to terminate a treaty was a nonjusticiable political question. See *id.* at 1002 (Rehnquist, J., concurring). Cf. *Baker v. Carr*, 369 U.S. 186, 211 (1962) (stating that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance”).

2. *Executive Branch Lawmaking Deference*

As noted above, matters labeled “political questions” often are instances of judicially-permitted executive branch lawmaking. The Supreme Court has held that the President has independent law-making powers relating to foreign affairs, although it has never specified the limits on these powers.⁴⁷ These powers include the ability to enter into at least some “sole executive agreements” with other nations that have the force in the United States of supreme federal law.⁴⁸ They also include the ability to determine the access of foreign governments to United States courts,⁴⁹ as well as the immunity from suit of foreign heads of state.⁵⁰ These latter powers have been said to stem from the President’s constitutional power to determine which foreign governments are formally “recognized” by the United States.⁵¹ The recognition power is in turn viewed as stemming from the President’s constitutional power to appoint and receive ambassadors.⁵² On these and other issues, courts “defer” to the law made by the executive branch.

3. *International Facts Deference*

Courts also typically give deference to the executive branch’s assessment of what could be called “international facts.” Some of these matters do have a strong empirical or predictive component. Perhaps most notably, when legally relevant, courts often defer to

⁴⁷ See generally Henkin, *supra* note 22, at 54–61 (discussing presidential lawmaking relating to foreign affairs); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 *Colum. L. Rev.* 1, 47–56 (1993) (same).

⁴⁸ See *supra* note 29 (citing cases).

⁴⁹ See, e.g., *Pfizer, Inc. v. India*, 434 U.S. 308, 319–20 (1978); *Matimak Trading Co. v. Khalily*, 118 F.3d 76, 82–83 (2d Cir. 1997), cert. denied, 522 U.S. 1091 (1998); see also *Restatement (Third)*, *supra* note 15, § 205 & cmt. a (stating that an Executive decision not to recognize a state or government entity implies a denial of access to the courts). But cf. *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 554 (2d Cir. 1988) (concluding that the executive branch’s withholding of formal recognition does not necessarily indicate a desire to preclude access to U.S. courts).

⁵⁰ See *infra* text accompanying notes 258–286.

⁵¹ For decisions affirming this recognition power, see *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137–38 (1938); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302–03 (1918); see also *Restatement (Third)*, *supra* note 15, § 204 (“[T]he President has exclusive authority to recognize or not to recognize a foreign state or government.”).

⁵² See U.S. Const. art. II, §§ 2–3; Barry E. Carter & Phillip R. Trimble, *International Law* 467 (3d ed. 1999).

the executive branch's assessment of United States foreign relations interests.⁵³ As with "political questions," however, many matters labeled by the Supreme Court as "international facts" seem more appropriately characterized as instances of executive branch lawmaking. Thus, for example, courts have deferred to the determination of the executive branch concerning the territorial boundaries of the United States,⁵⁴ the extent of another nation's sovereign territory,⁵⁵ and the proper characterization of a foreign conflict.⁵⁶ Importantly, courts defer to executive branch determinations of such "facts" even when they conflict with customary international law,⁵⁷ further confirming the legally binding nature of these determinations.

4. Persuasiveness Deference

Another type of "deference" is the general respect given by courts to the executive branch's views based upon its status as an able and knowledgeable representative of United States interests. In many areas of law, courts pay close attention to the views of the executive branch and accept those views if they find them persuasive; foreign affairs law is no exception.⁵⁸ This sort of deference is both very common and relatively uncontroversial.⁵⁹

⁵³ See, e.g., *Department of the Navy v. Egan*, 484 U.S. 518, 529–30 (1988) (deferring to the executive branch's "[p]redictive judgment" in not issuing a security clearance); *Regan v. Wald*, 468 U.S. 222, 242–43 (1984) (deferring to the executive branch on whether there was an adequate foreign policy justification for restricting travel to Cuba).

⁵⁴ See *Jones v. United States*, 137 U.S. 202, 221–23 (1890).

⁵⁵ See *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839).

⁵⁶ See, e.g., *The Three Friends*, 166 U.S. 1, 63 (1897); *The Protector*, 79 U.S. (12 Wall.) 700, 701–02 (1871); *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 337 (1822); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634 (1818).

⁵⁷ See Arthur M. Weisburd, *The Executive Branch and International Law*, 41 Vand. L. Rev. 1205, 1256–67 (1988).

⁵⁸ The federal government has statutory authority "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517 (1994). It is common for the executive branch to file statements of interest in foreign affairs cases based on this authority.

⁵⁹ This category of deference may explain the suggestion in some decisions that deference will be given to published opinions of the Attorney General concerning the meaning of federal statutes. See, e.g., *Squire v. Capoeman*, 351 U.S. 1, 8–9 (1956); *Oloteo v. INS*, 643 F.2d 679, 683 (9th Cir. 1981); see also *Tel-Oren v. Libyan Arab*

5. Chevron Deference

A final category of deference, and the principal focus of this Article, is deference to the reasonable views of the executive branch concerning the meaning of foreign affairs law that is made at least partially outside the executive branch. Although courts have not generally labeled it as such, for reasons that will become apparent, I will refer to this deference as "*Chevron* deference." The most obvious example of this type of deference concerns the meaning of federal foreign affairs statutes. As with domestic statutes, courts defer to the reasonable constructions of foreign affairs statutes by executive branch agencies charged with their administration. Indeed, courts have said that deference is particularly warranted in this context.⁶⁰ Another, less obvious, example is deference concerning the meaning of Article II treaties. The Supreme Court has long held that executive branch interpretations of treaties are entitled to "great weight."⁶¹

C. Critique of Deference

At least when added together, the various categories of deference amount to a very deferential approach by United States courts in the foreign affairs area. Certainly the approach seems more deferential to the Executive, on average, than the approach in cases conventionally labeled as "domestic" in nature. As Professor Henkin has succinctly observed, "foreign affairs makes a difference."⁶²

In most of its deference decisions, the Supreme Court has simply assumed, or has asserted in a conclusory fashion, that foreign affairs should in fact make a difference. But in a few instances—most

Republic, 726 F.2d 774, 780 n.6 (D.C. Cir. 1984) (Edwards, J., concurring) ("While opinions of the Attorney General of course are not binding, they are entitled to some deference, especially where judicial decisions construing a statute are lacking."), cert. denied, 470 U.S. 1003 (1985). But cf. *United States v. Zucca*, 351 U.S. 91, 101 (1956) (Clark, J., dissenting) ("Many cases witness the fact that the Court has often given little or no weight to carefully drawn opinions of the Attorney General on questions of statutory interpretation.").

⁶⁰ See, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999); *Paradissiotis v. Rubin*, 171 F.3d 983, 988 (5th Cir.), cert. denied, 120 S. Ct. 322 (1999); *Springfield Indus. Corp. v. United States*, 842 F.2d 1284, 1285–86 (Fed. Cir. 1988).

⁶¹ See *infra* note 224 (citing cases).

⁶² Henkin, *supra* note 22, at 132.

notably in its 1936 *Curtiss-Wright* decision—it has attempted an explanation.⁶³ The explanation runs essentially as follows: Foreign affairs are substantially different from domestic affairs. Unlike in the domestic realm, where governmental power is shared between the three branches of the federal government and with the states, the executive branch acts as the “sole organ” of the United States in its conduct of foreign relations. In carrying out this role, the executive branch needs a high degree of flexibility in order to respond to complex and changing world conditions. Executive branch decisions in this area tend to be more political than legal in nature and thus are properly made by a politically accountable branch of government. Moreover, the executive branch has much greater expertise and access to information than the courts concerning foreign affairs matters. As a result, judicial deference to the executive branch is consistent with democratic values and also helps ensure that the United States operates effectively in the international community.

This explanation has been heavily criticized by academic commentators.⁶⁴ As these commentators have pointed out, the distinction between foreign and domestic affairs is not always very clear and, in any event, has eroded in recent years. In addition, the President never has in fact served as the “sole organ” of the United States in foreign affairs. The Constitution assigns foreign affairs responsibilities to all three branches of the federal government, and both Congress as a whole and the Senate in its treaty-ratification capacity often play an important role in such matters.⁶⁵ Moreover, the need for flexibility is often no greater in foreign affairs matters than it is in complex domestic matters, especially in the post-Cold War era. And, although it may well make sense for courts not to second-guess the executive branch’s foreign *policy*, it is not clear to what extent judicial enforcement of foreign affairs *law* will actually impede the ability of the United States to act effectively in international relations. Furthermore, Supreme Court statements expressing

⁶³ See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

⁶⁴ See, for example, the materials referred to above in note 2.

⁶⁵ A recent reminder of the important role played by the Senate in the treaty-ratification process was its rejection of the Comprehensive Nuclear Test Ban Treaty. See Barbara Crossette, *Around the World, Dismay Over Senate Vote on Treaty*, N.Y. Times, Oct. 15, 1999, at A1.

this concern are phrased in such broad generalities that they threaten to completely immunize the federal government's foreign affairs activities from judicially enforced restraints.⁶⁶ Finally, critics have correctly noted that courts do not always defer when a case implicates foreign affairs; if "foreign affairs" is the touchstone for deference, the case law looks incoherent.

It is difficult to disagree with these points of criticism. The conclusion one draws from the critique is more uncertain. Most of the commentators making this critique have concluded that, at least in general, deference to the executive branch in foreign affairs cases is improper. Almost invariably these commentators invoke the importance of the "rule of law" and quote reverently from *Marbury*. In describing the heavy deference courts have given to the executive branch in foreign affairs cases, these commentators use phrases like "judicial abdication" and talk about the courts having made "Faustian pacts."⁶⁷ The choice, as these commentators appear to see it, is between two extremes: Either courts enforce foreign affairs law against the Executive or they fail in their judicial duty.

This "*Marbury* perspective" does avoid some of the problems associated with the Supreme Court's explanations for deference, but it has its own difficulties. One problem with it is its unitary treatment of "foreign affairs law." The issue of deference to the

⁶⁶ See, e.g., *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."). The Court has used similarly broad language suggesting the absence of any federalism restraints on the federal government's exercise of foreign affairs powers. See, e.g., *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear."). For a critique of this latter proposition, see Bradley, *Treaty Power*, *supra* note 13.

⁶⁷ The term "Faustian pact" is used metaphorically to refer to a tacit understanding between the judicial and executive branches that the courts will exercise the power of judicial review in domestic cases but will give the executive branch free rein in foreign affairs cases. See Franck, *supra* note 2, at 10–11; see also David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. Colo. L. Rev. 1439, 1442 (1999) (borrowing Franck's phrasing).

executive branch arises with respect to a variety of types of foreign affairs law. Included in this list is international law, both treaty-based and customary. The propriety of deference to the executive branch may vary between domestic and international law, and between forms of international law. In addition, as noted above, the Supreme Court has held that the executive branch has independent lawmaking powers in the area of foreign affairs; deference to the executive branch when it exercises those powers would not seem to raise the same "judicial abdication" concerns raised with respect to law made outside the executive branch.⁶⁸

A second problem with the *Marbury* perspective is its broad-brushed approach to "deference." Some forms of deference may be more defensible than others. Persuasiveness deference, for example, probably does not raise the same judicial abdication concerns as political question deference. Moreover, the critique fails to take account of the fact that courts often defer to the executive branch in domestic cases as well. As a result, even if, as one commentator states, "there are no valid reasons . . . for treating foreign relations cases differently than any others,"⁶⁹ some deference might still be proper. Such deference may be especially warranted given the Constitution's express assignment of certain foreign affairs powers to the Executive. Unlike its provisions concerning Congress, the Constitution says relatively little about the specific powers of the President. Much of what it does say, however, is focused on foreign affairs. In particular, we know from Article II that the President is the Commander in Chief of the armed forces, that he has the responsibility for appointing and receiving ambassadors, and that he is able to make treaties with the consent of the Senate. Although perhaps not the "sole organ," the President plays a central foreign affairs role in our constitutional scheme.

A third problem with the *Marbury* perspective is its sharp distinction between law and policy. The critique does not dispute that the executive branch has functional advantages over the courts in conducting United States foreign relations; rather, it seeks to distinguish the policy aspects of these relations from the legal aspects.

⁶⁸ See *supra* text accompanying notes 47–52.

⁶⁹ Franck, *supra* note 2, at 7.

It is not clear, however, that foreign affairs law can be neatly divorced from foreign affairs policy. Interpretation of foreign affairs law may require assessments of international conditions and relationships. Moreover, this law may have interpretive gaps that require, in effect, *lawmaking*. Even if the executive branch is not the “sole organ” of the United States in foreign affairs, this branch may well have a better claim than the courts to make these sorts of interpretive and legislative decisions. Indeed, Congress itself recognizes the executive branch’s expertise in this area and thus often conveys broad discretion to the executive branch in foreign affairs-related statutes.⁷⁰

In sum, neither the extremely deferential approach, suggested in Supreme Court dicta and at least sometimes followed by the courts, nor the *Marbury* perspective, so popular with academic commentators, appears satisfactory. It is not my goal here to establish a complete alternative to these approaches, but rather to suggest a different way of thinking about the deference issue—one that sheds new light on the question and at least begins to point the way to a better approach.

II. THE *CHEVRON* DOCTRINE

To those readers familiar with administrative law, some of the difficulties with the *Marbury* perspective should sound familiar. Similar issues concerning the source of law, the types and degrees of deference, and the distinction between law and policy underlie the *Chevron* doctrine. In this Part, I describe the doctrine and its rationales, and I suggest some ways in which this doctrine may provide a useful perspective for evaluating foreign affairs deference. In addition, to set up discussions that follow, I consider the relationship between the *Chevron* doctrine and canons of construction.

⁷⁰ Examples include the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–06 (1994), the Trading with the Enemy Act of 1917, 50 U.S.C. App. §§ 1–5 (1994), and provisions in the Trade Expansion Act of 1962, 19 U.S.C. § 1801–1991 (1994), as amended by the Trade Act of 1974, 19 U.S.C. § 2101–2495 (1994). Under Justice Jackson’s influential three-tiered framework for assessing presidential power, the President’s powers are at their highest when they are supported by congressional approval. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

A. Chevron Deference

Deference to agency interpretations of law did not originate with the *Chevron* decision. Before *Chevron*, the Supreme Court considered a variety of factors in deciding whether to defer to agency interpretations of law, such as whether the interpretation was rendered contemporaneously with the enactment of the statute, whether the agency had been consistent in its interpretation, and whether the interpretation reflected agency expertise.⁷¹ Although not without its defenders, this "multifactored contextual approach"⁷² resulted in a great deal of uncertainty and inconsistency concerning the degree of deference given to agency interpretations.⁷³

At least in hindsight, we know that the *Chevron* decision established a new framework for judicial review of agency interpretations of law. In *Chevron*, the Court accepted the Environmental Protection Agency's interpretation of the term "source" in the Clean Air Act Amendments of 1977 as referring to an entire plant rather than a single pollution-emitting device.⁷⁴ In doing so, the Court applied a two-part test for reviewing agency constructions of the statutes they administer.⁷⁵ The first step is to determine whether Congress

⁷¹ See Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.1, at 107-09 (3d ed. 1994); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. Pa. L. Rev. 549, 552-67 (1985).

⁷² Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 995 (1992).

⁷³ See Davis & Pierce, *supra* note 71, § 3.1, at 107-09. For a defense of the Court's pre-*Chevron* approach and an argument that *Chevron* did not substantially change that approach, see Charles H. Koch, Jr., *Administrative Law and Practice* §§ 12.30-12.32 (2d ed. 1997). Under Professor Koch's view, the Court has long and properly distinguished between situations in which agencies are exercising delegated policymaking authority and situations in which agencies are merely interpreting law made by Congress. With respect to the latter situation, Koch disagrees with the suggestion in *Chevron* (and in much academic commentary) that courts must accept reasonable agency constructions of ambiguous statutes even when the courts disagree with such constructions. Nevertheless, Koch approves of courts giving some (and, at least sometimes, substantial) deference to such constructions. See *id.* § 12.33, at 264-68.

⁷⁴ See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 837, 851-66 (1984).

⁷⁵ See *id.* at 842-43. The Court in *Chevron* may not have intended to establish a new framework. The decision does not purport to be announcing new law, and its acceptance of the agency interpretation in that case might be explained by reference to the traditional deference factors. Nevertheless, the decision has been read—by

has clearly spoken to the issue. If it has, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁷⁶ If Congress’s intent concerning the issue is not clear, the court is to determine whether the agency’s interpretation is based on a “permissible” construction of the statute.⁷⁷ If it is, the court is required to defer to the agency’s interpretation, even if the court would have otherwise adopted a different interpretation.

This deference under “Step Two” of *Chevron* appears, at least at first glance, to be in tension with the historic conception of the judicial role. Under the separation-of-powers structure of our federal government, Congress is to make the law, the courts are to interpret it, and the executive branch is to enforce it. The *Chevron* doctrine appears to subvert this scheme by shifting some of the law-interpretation function to the executive branch.

The Supreme Court’s answer to this apparent separation-of-powers problem begins with a combination of legal realism and democratic theory. The Court invoked the realist insight that the interpretation of ambiguous statutes is, in many instances, closer to lawmaking than law interpretation. This is particularly true with respect to modern regulatory statutes, which, due to limitations on Congress’s time and foresight and the complexity of the issues, inevitably leave open many issues of specific application. If statutory interpretation is closer to lawmaking than law interpretation, it might actually subvert separation of powers for courts *not* to defer to agencies with more expertise and democratic accountability. As the Court put it in *Chevron*:

Judges are not experts in the field, and are not part of either political branch of the Government. . . .

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—

commentators, lower courts, and the Supreme Court itself in subsequent decisions—as establishing a new framework for judicial review of agency interpretations of law. See Gary Lawson, *Federal Administrative Law* 588 (1998) (“The world of judicial review of agency legal conclusions is now clearly the world of *Chevron*.”).

⁷⁶ *Chevron*, 467 U.S. at 842–43.

⁷⁷ *Id.* at 843.

have a duty to respect legitimate policy choices made by those who do.⁷⁸

Despite these points, legal realism and democratic theory are probably not enough by themselves to explain *Chevron* deference. Courts, after all, still engage in full-scale statutory interpretation in other contexts without perceiving any separation-of-powers violation. Moreover, much of the Supreme Court's constitutional decisionmaking can be viewed as policymaking; yet the Court has not suggested that it should defer to the other branches on constitutional questions. In addition, it is not entirely clear from a formal separation-of-powers standpoint why the executive branch, notwithstanding its expertise and electoral accountability, should be allowed what is in effect lawmaking power, given that it is constitutionally charged with enforcing rather than making the law. Finally, if based solely on functional arguments, it is unclear how *Chevron* deference can be reconciled with the statutory command in the Administrative Procedure Act that reviewing courts are to "decide all relevant questions of law."⁷⁹

The linchpin of the *Chevron* doctrine therefore is not realism or democratic theory, but rather a theory of delegation. Under *Chevron*, courts presume that, when Congress charges an agency with administering an ambiguous statute, Congress is *delegating* lawmaking power to the agency. It is this delegation that requires courts, from a formal separation-of-powers standpoint, to defer to the agency.⁸⁰ As the Court suggested in *Chevron* and made clearer in subsequent decisions, "[a] precondition to deference under

⁷⁸ Id. at 865-66. See also Richard J. Pierce, Jr., *Chevron* and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions, 41 Vand. L. Rev. 301, 303 (1988) (arguing that *Chevron* deference is proper because "agencies are the best equipped institutions to resolve policy questions in the statutes that grant the agency its legal power"); Laurence H. Silberman, *Chevron*—The Intersection of Law & Policy, 58 Geo. Wash. L. Rev. 821, 822 (1990) ("*Chevron*'s rule—that the federal judiciary must defer to an agency's reasonable construction of a statute it is charged with enforcing, if Congress has not directly addressed the question at issue—is simply a sound recognition that a political branch, the executive, has a greater claim to make policy choices than the judiciary.").

⁷⁹ 5 U.S.C. § 706 (1994). See generally John F. Duffy, Administrative Common Law in Judicial Review, 77 Tex. L. Rev. 113, 193-95 (1998) (discussing this tension).

⁸⁰ See Henry P. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 27-28 (1983); see also Merrill, *supra* note 72, at 979 (describing *Chevron*'s delegation presumption as its "third and probably most controversial innovation").

Chevron is a congressional delegation of administrative authority.”⁸¹ The executive branch thus is allowed to engage in lawmaking under the *Chevron* doctrine for the same reason that federal courts may engage, after *Erie Railroad v. Tompkins*,⁸² in common lawmaking—they have been implicitly delegated this power.⁸³

The *Chevron* delegation presumption, as other commentators have noted, has a fictional quality to it.⁸⁴ When Congress enacts a statute with ambiguities or omissions, it is very possible that Congress simply was not thinking of the issues in question rather than making a conscious delegation of authority to the agency. The presumption therefore is not based, at least strongly, on likely congressional intent. Instead, it is based partly on the Court’s sense of what Congress *would have wanted* if it had thought about the issue, and partly on institutional considerations relating to separation of powers and democratic accountability. The presumption thus operates as a judicially imposed background rule against

⁸¹ *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990); see also, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291, 1314 (2000) (“Deference under *Chevron* to an agency’s construction of a statute that it administers is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”); *Pauley v. Bethenergy Mines*, 501 U.S. 680, 696 (1991) (referring to situations in which Congress “has delegated policymaking authority to an administrative agency”). The Court suggested this in *Chevron* when it referred to express and implicit delegations of authority to agencies, see *Chevron*, 467 U.S. at 843–44, and when it later referred to agencies “to which Congress had delegated policymaking responsibilities.” *Id.* at 865.

⁸² 304 U.S. 64 (1938).

⁸³ Most commentators agree that post-*Erie* federal common lawmaking requires some sort of a statutory or constitutional delegation. See, e.g., Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881, 887 (1986); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 Pace L. Rev. 263, 286–88 (1992); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 17 (1985). Even Judge Henry Friendly, one of the most enthusiastic supporters of federal common law, appeared to assume this delegation requirement. See Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 407 (1964) (stating the federal common law was appropriate “where Congress, acting within powers granted to it, has manifested, be it ever so lightly, an intention to that end”). Surprisingly, few commentators have noted this parallel between the federal common law delegation requirement and the *Chevron* delegation requirement.

⁸⁴ See, e.g., Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 Harv. L. Rev. 469, 490–91 (1996); Merrill, *supra* note 72, at 979, 995–96; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 (1989).

which Congress can legislate, not primarily as a guide to ascertaining congressional intent.⁸⁵ In this respect, the *Chevron* doctrine is akin to “clear statement” rules that are designed to promote structural constitutional values such as federalism.⁸⁶ This is not to say that the doctrine is a purely fictional label attached to functional considerations; in a variety of ways the Court limits the presumed delegation to situations in which there is a formal basis for concluding that Congress has transferred lawmaking authority.⁸⁷

A significant implication of both *Chevron*’s realist premise and its delegation presumption is that agencies may be entitled to deference even if they change their interpretation. Agencies are understood under *Chevron* to be engaging in delegated lawmaking, so there is no reason why they cannot *change* the law.⁸⁸ As the Supreme Court has stated, “change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.”⁸⁹

⁸⁵ See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 621–27 (1996); Scalia, *supra* note 84, at 517.

⁸⁶ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991) (requiring a plain statement before statutes will be construed as intruding on traditional state functions). See generally William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992) (categorizing and assessing various types of clear statement rules). Professor John Duffy argues that the *Chevron* doctrine is unlike other canons of construction because the doctrine is “not a rule to help the court determine a meaning.” Duffy, *supra* note 79, at 197. If Duffy’s point is that the *Chevron* doctrine is not primarily designed to ascertain actual legislative intent, the same thing can be said about many of the canons. If his point is instead that the *Chevron* doctrine, by allowing administrative agencies to change their interpretation of a statute, does not result in a *fixed* meaning, that is not quite accurate: The fixed meaning of a statute subject to the *Chevron* canon is that the statute delegates interpretive authority to the agency.

⁸⁷ See *infra* Part II.C. It is thus not correct to say, as many commentators have said casually, that the delegation is based simply on an ambiguity in the law that the agency is interpreting. It is not the ambiguity by itself that creates the presumed delegation—it is also the fact that Congress has charged the agency with administering the law in question.

⁸⁸ See Scalia, *supra* note 84, at 517.

⁸⁹ *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 742 (1996).

B. Advantages of the Chevron Perspective

The *Chevron* doctrine is grounded in both functional and formal considerations. Functionally, it pushes “interpretive lawmaking” to government entities that have more expertise and democratic accountability than courts. In addition, by centralizing this lawmaking in the executive branch rather than in a diffuse court system, the *Chevron* doctrine is designed to promote uniformity in the law.⁹⁰ And by allowing for changes in interpretation, it seeks to promote flexibility in regulatory governance. As a formal matter, the *Chevron* doctrine also purports to preserve Congress’s role as the lawmaker. Courts defer to agencies because Congress has presumptively delegated lawmaking power to those agencies. Congress legislates against the backdrop of this presumption and is always able to override it.

To be sure, the *Chevron* doctrine is not free from controversy. Its critics have argued in particular that it shifts too much power to the executive branch.⁹¹ This Article is not the place for a full-scale defense of *Chevron*. It is sufficient for my purposes to note two points. First, the *Chevron* doctrine appears to be well-entrenched in the Supreme Court, with all of the nine current justices accepting its basic framework.⁹² Second, regardless of whether the criticisms of *Chevron* have force as a general matter, they have less force in the context of foreign affairs law—an area characterized long before *Chevron* by exceedingly broad executive branch power and sweeping deference by the courts. Given this history, application of the *Chevron* perspective to foreign affairs law poses substantially less danger of centralizing power in the executive branch than does applying it to other areas of law.⁹³

⁹⁰ See Pierce, *supra* note 78, at 310–13; Peter L. Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action, 87 Colum. L. Rev. 1093, 1121 (1987).

⁹¹ See, e.g., Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 525 (1989).

⁹² See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000) (accepting applicability of *Chevron* in both the majority and dissenting opinions); *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999) (evinced all justices’ endorsement of the application of *Chevron*).

⁹³ In addition, Administrative Procedure Act-related objections to *Chevron* are less relevant in the foreign affairs context (since many foreign affairs cases involve deference to the President) whereas the Act has been construed not to extend to

There are also a number of ways in which the *Chevron* perspective may offer greater benefits in foreign affairs law than in other areas of law. Part of its value in foreign affairs law comes simply in providing a framework for understanding and controlling deference in what is an otherwise very amorphous area. The *Chevron* perspective also focuses attention on the source of the law in question, something that turns out to be especially important in foreign affairs law, given that it includes a number of nontraditional types of law. Furthermore, this perspective focuses attention on delegation of authority and thereby highlights claims of independent Executive lawmaking power—claims that often lurk beneath the surface of foreign affairs cases. Considering foreign affairs law from this perspective, as I will show, may also yield insights concerning the status of international law in the United States legal system. Finally, and most generally, the *Chevron* perspective offers a realistic and middle-ground alternative to both the *Marbury* perspective and blanket judicial deference, both of which appear unsatisfactory for the reasons discussed above.

With respect to the last point, it is important to remember that the *Chevron* doctrine contains a number of built-in limitations on deference. Courts do not defer if they conclude that the meaning of the law is clear. This may be a significant limitation, especially when applied by “textualist” judges.⁹⁴ Moreover, to the extent that Step One of *Chevron* encourages Congress to be more specific in its enactments, it may actually reduce Executive power over time.⁹⁵ Another limitation concerns the statutes that trigger *Chevron* deference. The delegation theory of *Chevron* requires that, in order to receive deference, the agency must be charged with administering the law in question.⁹⁶ This “administration” requirement is part of the textual basis for the presumed delegation, and it serves as a form of notice to Congress concerning which statutes will be sub-

judicial review of presidential action. See *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

⁹⁴ See Thomas W. Merrill, Textualism and the Future of the *Chevron* Doctrine, 72 Wash. U. L.Q. 351, 366 (1994); Scalia, *supra* note 84, at 520–21.

⁹⁵ See *Davis & Pierce*, *supra* note 71, § 3.3, at 116.

⁹⁶ See *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). The Supreme Court has never fully explained what is required in order for an agency to “administer” a statute for purposes of *Chevron*. As one commentator notes, “[i]n general, . . . agencies are said to ‘administer’ statutes for which they have some special responsibility.” Lawson, *supra* note 75, at 589.

jected to the presumption. This requirement limits both the number of laws subject to *Chevron* deference and the number of executive branch entities entitled to this deference. Still another limitation concerns the form of the agency's interpretation. The Supreme Court has held that executive branch litigating positions that are "wholly unsupported by regulations, rulings, or administrative practice" are not entitled to *Chevron* deference.⁹⁷ Application of this doctrine may therefore reduce deference to the executive branch's ad hoc litigating positions, something that has been a particular concern in the foreign affairs area.⁹⁸

C. Relationship with Canons of Construction

As will be seen below, foreign affairs law highlights one of the most uncertain aspects of the *Chevron* doctrine—its relationship with canons of construction. The Supreme Court has stated that courts are to use "traditional tools of statutory construction" when applying the *Chevron* test.⁹⁹ This statement would seem to support reliance on at least some canons of construction. And, indeed, the Court regularly applies text-oriented canons in determining whether Congress has spoken to an issue under Step One of *Chevron*.¹⁰⁰ Some canons of construction, however, are more substantive

⁹⁷ *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)); see also *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[C]ourts may not accept [agency] counsel's *post hoc* rationalizations for agency action."). See generally Robert A. Anthony, Which Interpretations Should Bind Citizens and Courts?, 7 *Yale J. on Reg.* 1 (1990) (arguing that courts generally should not give *Chevron* deference to informal agency interpretations). There is a conflict in the lower courts over whether *Chevron* deference is owed to an agency's interpretive rules, which are not subject to notice and comment requirements. See Lawson, *supra* note 75, at 597–80 (collecting decisions).

⁹⁸ See *infra* Part III.

⁹⁹ *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (applying "ordinary canons of construction").

¹⁰⁰ See, e.g., *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501–02 (1998) (applying canon "that similar language contained within the same section of a statute must be accorded a consistent meaning"); *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (applying *noscitur a sociis* canon that words grouped in a list should be given a related meaning).

or policy-oriented in nature.¹⁰¹ These canons (like *Chevron* itself) do not really help a court ascertain whether Congress has spoken to an issue; instead, they rule out certain otherwise plausible interpretations of an ambiguous statute. A court's reliance on these canons to override an agency construction may be in tension with the very reasons for *Chevron* deference: The canons reflect beliefs about good policy, yet the *Chevron* doctrine presumes that the agency rather than the court is the one to make the policy decision.¹⁰²

In part because of this tension, some courts have declined to apply policy-oriented canons to limit *Chevron* deference. For example, the D.C. Circuit declined to limit its deference to the Attorney General's interpretation of an antitrust exemption in the Newspaper Preservation Act by virtue of the canon that exemptions to the antitrust laws should be narrowly construed.¹⁰³ The court explained that the policy decision made by the Attorney General, which involved a balance of the "pro-consumer direction of the antitrust laws and a congressional desire embodied in the Newspaper Preservation Act that diverse editorial voices be preserved despite the unique economics of the newspaper industry," was "precisely the paradigm situation *Chevron* addressed."¹⁰⁴ The court also reasoned that "*Chevron* implicitly precludes courts picking and choosing among various canons of statutory construction to reject reasonable agency interpretations of ambiguous statutes."¹⁰⁵ For similar reasons, the same court has also declined to limit *Chevron* deference by virtue of the canon that remedial legislation should be broadly construed,¹⁰⁶ and the Ninth Circuit has declined

¹⁰¹ See Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn its Lonely Eyes to You?*, 45 Vand. L. Rev. 561, 563-64 (1992) (distinguishing "descriptive" canons from "normative" canons).

¹⁰² See Merrill, *supra* note 72, at 988 ("[I]f an agency interpretation is consistent with the language and purpose of a statute, it is hard to see how it could be condemned as unreasonable simply because a judicial canon would suggest a contrary result.").

¹⁰³ See *Michigan Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1292-97 (D.C. Cir. 1989), *aff'd* by an equally divided Court, 493 U.S. 38 (1989).

¹⁰⁴ *Id.* at 1293.

¹⁰⁵ *Id.* at 1292. See generally Denise W. DeFranco, *Chevron* and Canons of Statutory Construction, 58 Geo. Wash. L. Rev. 829 (1990) (discussing this decision).

¹⁰⁶ See *Ober United Travel Agency v. United States Dep't of Labor*, 135 F.3d 822, 825 (D.C. Cir. 1998); *Wagner Seed Co. v. Bush*, 946 F.2d 918, 924-25 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 970 (1992).

to limit *Chevron* deference by virtue of the canon that statutes passed to benefit Native Americans should be liberally construed.¹⁰⁷

The Supreme Court has made clear, however, that at least some policy-oriented canons do trump *Chevron* deference. In *DeBartolo Corp. v. Florida Gulf Coast Trades Council*,¹⁰⁸ for example, it held that the “constitutional avoidance canon”—that statutes should be construed, where reasonably possible, to avoid serious constitutional questions—takes precedence over *Chevron* deference.¹⁰⁹ And in *Bowen v. Georgetown University Hospital*,¹¹⁰ the Court held that the presumption against retroactivity limits *Chevron* deference.¹¹¹

As other commentators have noted, one way of understanding the precedence of certain policy-oriented canons over *Chevron* deference is that they operate as nondelegation principles. Normally, the logic of *Chevron* would compel deference to agency constructions notwithstanding a conflict with a policy-oriented canon. In some situations, however, Congress’s power relating to a canon is considered nondelegable because the courts believe that Congress, rather than administrative agencies, should deliberate on the issue. As Professor Cass Sunstein explains, these nondelegation canons ensure “that Congress, rather than bureaucrats, will deliberate on questions that raise serious constitutional difficulties or intrude into constitutionally sensitive areas.”¹¹²

Applying this theory, it is easy to see why the constitutional avoidance canon would trump *Chevron* deference. The canon is premised on the idea that the exercise of constitutional judicial review should be limited to situations where Congress has actually deliberated close to the constitutional line. Allowing administrative agencies to trigger the exercise of such judicial review would con-

¹⁰⁷ See *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 n.4 (9th Cir. 1990); *Shields v. United States*, 698 F.2d 987, 990–91 (9th Cir.), cert. denied, 464 U.S. 816 (1983). See generally Peter S. Heinecke, Note, *Chevron* and the Canon Favoring Indians, 60 U. Chi. L. Rev. 1015 (1993) (discussing the relationship between *Chevron* and the canon favoring Native Americans).

¹⁰⁸ 485 U.S. 568 (1988).

¹⁰⁹ *Id.* at 575–78.

¹¹⁰ 488 U.S. 204 (1988).

¹¹¹ See *id.* at 208–09.

¹¹² Sunstein, *supra* note 7, at 2112; see also Kahan, *supra* note 84, at 504–05 (making a similar point). Professor Sunstein expanded on this idea in a recent article. See Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315 (2000).

flict with the very purpose of the canon. Moreover, Congress presumably has at least as much expertise as administrative agencies in assessing potential constitutional problems with legislation. Application of the presumption against retroactivity is slightly less clear, but it too can be justified under this theory. Arguably, the presumption against retroactivity is designed to induce Congress to consider explicitly the potential unfairness of retroactivity before this result is imposed. One reason for this preference for Congress may be that retroactivity raises, at least in a general way, due process concerns—thus implicating, like the constitutional avoidance canon, constitutionally related issues over which Congress itself should deliberate.¹¹³ In addition, as with determining constitutional boundaries, Congress presumably has as much, if not more, expertise than agencies on this unfairness issue.¹¹⁴

In light of these general points, I now consider the potential relevance of the *Chevron* doctrine to specific areas of foreign affairs law. As discussed above, there are several types of foreign affairs law. There is, of course, constitutional foreign affairs law, in

¹¹³ See Sunstein, *supra* note 112, at 332 ("The best way to understand this idea is as an institutional echo of the notion that the Due Process Clause forbids retroactive application of law.").

¹¹⁴ For similar reasons, the D.C. Circuit has held that the presumption against applying federal statutory requirements to state governments takes precedence over *Chevron*. See *California State Bd. of Optometry v. FTC*, 910 F.2d 976, 981–82 (D.C. Cir. 1990). As the court explained, this presumption is designed to require, as a protection of state interests, actual congressional deliberation, making deference on this issue inappropriate. See *id.* at 981. Other federalism-protection canons presumably will work the same way. See Kahan, *supra* note 84, at 505 (explaining that the federalism clear statement rule probably should trump *Chevron* deference because the executive branch is less responsive to state interests than Congress). See also *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) ("[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise."). The existence of such delegation-trumping canons and presumptions may also explain why courts do not apply *Chevron* to Justice Department interpretations of criminal law—they presume (for separation of powers and other reasons) that Congress does not intend to mix lawmaking with criminal enforcement, and this presumption is understood as trumping *Chevron* deference. See *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."). But cf. Kahan, *supra* note 84, at 91 (arguing that *Chevron* deference should be given to the Justice Department's interpretation of criminal statutes).

particular the law regulating the foreign affairs powers of Congress and the President. While this law often is a candidate for political question deference, it is not typically a candidate for *Chevron*-type deference; that is, courts generally do not feel bound by the reasonable views of the executive branch concerning the meaning of the Constitution.¹¹⁵ As a result, I focus instead on three other types of foreign affairs law: federal statutory law; international law, both treaty-based and customary; and the federal common law of foreign relations.

III. STATUTORY FOREIGN AFFAIRS LAW

In this Part, I consider the relationship between *Chevron* deference and statutory foreign affairs law. The principal areas of uncertainty here concern the interaction of the *Chevron* doctrine with two foreign-affairs-related canons of construction—the *Charming Betsy* canon and the presumption against extraterritoriality. I conclude that, as a general matter, these canons should not trump *Chevron* deference, at least where there is a “controlling executive act.” I leave open one possible exception to this conclusion, for situations in which there is a potential conflict between an executive branch interpretation of a statute and a self-executing treaty.

A. General Issues

Much of foreign relations law emanates from Congress in the first instance. The executive branch has few enumerated foreign affairs powers in the Constitution. It has been found to have some implicit powers, perhaps even extra-constitutional powers, but it nevertheless traces many exercises of its foreign affairs powers to statutory grants. As Professor Harold Koh has noted, “[t]he vast majority of the foreign affairs powers the president exercises daily are not inherent constitutional powers, but rather, powers that Congress has expressly or implicitly delegated to him by statute.”¹¹⁶

¹¹⁵ Sometimes, however, standards-based constitutional requirements will require an assessment of foreign relations interests, in which case courts may defer to the executive branch’s assessment of those interests. I have labeled this a form of “international facts” deference. See *supra* text accompanying notes 53–57.

¹¹⁶ Koh, *supra* note 2, at 45.

Moreover, Congress has in recent years codified a number of areas of foreign affairs law that were previously subject to Executive discretion.¹¹⁷ The *Chevron* doctrine applies to these statutes just as it applies to domestic statutes. Indeed, it may apply with special force.

In considering the proper application of the *Chevron* doctrine in this statutory context, it is important to keep in mind that *Chevron* applies only to statutes that the agency in question is empowered to administer. Only in this situation is there a basis for presuming that Congress has delegated lawmaking power to the agency.¹¹⁸ Given this limitation, it would not be proper under *Chevron* to accord deference, for example, to the executive branch's views regarding the meaning of the Alien Tort Statute ("ATS").¹¹⁹ This statute, which is also referred to as the Alien Torts Claim Act, was first enacted as part of the Judiciary Act of 1789. It states that the federal district courts shall have jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹²⁰ Although the statute was rarely invoked before 1980, it has since become the principal statutory vehicle for international human rights litigation in United States courts.¹²¹ The commentators who support this litigation often place substantial weight on the fact that the executive branch has at times favored a broad construction of the statute.¹²² The executive branch, however, is not charged with administering the ATS. Rather, the statute is a direct congressional regulation of federal court jurisdiction. As a result, there is no basis in the statute for presuming a delegation of lawmaking power to the executive branch.¹²³ This is not to say that courts should treat the executive

¹¹⁷ See generally Andrew W. Hayes, Note, The Boland Amendments and Foreign Affairs Deference, 88 Colum. L. Rev. 1534 (1988) (describing this development). One example is the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11 (1994), which is discussed below.

¹¹⁸ See *supra* Part II.B.

¹¹⁹ 28 U.S.C. § 1350 (1994).

¹²⁰ *Id.*

¹²¹ The seminal decision is *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which held that the ATS allows for jurisdiction over claims between alien parties concerning human rights abuses committed in other countries. See *id.* at 887, 890.

¹²² See, e.g., Koh, *supra* note 38, at 1842-43; Neuman, *supra* note 38, at 377-78.

¹²³ Whether Congress *could* delegate such power over federal court jurisdiction to the executive branch is a complicated question. See *Rein v. Socialist People's Libyan*

branch's views as irrelevant to statutory issues such as this one. The executive branch's views regarding the practical effect of an interpretation may well be an important consideration in construing a statute, depending on a judge's approach to statutory construction. And, as with many issues concerning federal policy, "persuasiveness deference" may be proper.¹²⁴ But these forms of deference are not *Chevron* deference, that is, binding deference concerning the meaning of the law itself.

The Ninth Circuit faced this issue in considering whether the ATS authorized jurisdiction over a suit by a Philippine citizen against Ferdinand Marcos and his daughter for the alleged torture and murder of the plaintiff's son in the Philippines.¹²⁵ In that case, the Justice Department filed an *amicus curiae* brief arguing that the ATS did not authorize jurisdiction over the suit.¹²⁶ In refusing to defer to the Department's position, the Ninth Circuit emphasized the fact that different administrations had adopted different constructions of the ATS.¹²⁷ Change of position, however, does not by itself disqualify *Chevron* deference.¹²⁸ The Ninth Circuit would have been on firmer *Chevron* ground if it had simply tied its refusal to defer to the lack of a delegation of lawmaking authority to the executive branch.¹²⁹ Regardless of whether the executive branch has been consistent, the courts should not be bound by its interpretation of the ATS.¹³⁰

Arab Jamahiriya, 162 F.3d 748, 762–63 (2d Cir. 1998) (raising but not deciding this issue in connection with recent amendments to the Foreign Sovereign Immunities Act), cert. denied, 119 S. Ct. 2337 (1999).

¹²⁴ See *supra* text accompanying notes 58–59.

¹²⁵ See *Trajano v. Marcos*, 978 F.2d 493, 498–99 (9th Cir. 1992), cert. denied, 513 U.S. 1126 (1995).

¹²⁶ See *id.* at 500.

¹²⁷ See *id.* (“[The DOJ’s] change of position in different cases and by different administrations is not a definitive statement by which we are bound on the limits of [the ATS].”).

¹²⁸ See *supra* notes 88–89 and accompanying text.

¹²⁹ The Ninth Circuit also might have refused to defer based on the fact that the executive branch view was merely an *ad hoc* litigating position. See *supra* note 97 and accompanying text.

¹³⁰ This discussion is not intended to suggest that the Ninth Circuit correctly construed the ATS in *Trajano*, just that it properly declined to defer to the executive branch's construction of the statute. For a textual analysis of the ATS suggesting that it was intended simply to confer on the federal courts a portion of Article III diversity jurisdiction, see John C. Harrison, *The Law of Nations as Law of the United States in*

There is another general statutory issue that comes up in the foreign affairs context—whether courts should defer to the executive branch concerning the *scope* of its statutory authority. At least until recently, the Supreme Court had not conclusively determined whether *Chevron* deference applies to an agency's construction of the scope of its authority.¹³¹ On the one hand, it might seem unreasonable to presume that Congress intended to delegate interpretive authority over *that* issue to the agency, since the agency might be tempted to interpret the scope of its authority too broadly.¹³² On the other hand, as Justice Antonin Scalia has argued, the line between interpretation of substantive provisions and interpretation of scope of authority is often unclear, and, in any event, agencies may have *Chevron*-relevant expertise concerning the latter issue.¹³³

In a recent decision, the Court appears to have concluded that *Chevron* does in fact apply to scope-of-authority issues.¹³⁴ In any event, regardless of how this issue should be resolved in general, there are particular reasons to apply *Chevron* deference to scope-of-authority issues in the foreign affairs context. Changing world conditions and the executive branch's unique access to foreign affairs information suggest that when Congress delegates foreign affairs authority to the executive branch, it often "must of necessity paint with a brush broader than that it customarily wields in do-

the Judiciary Act of 1789 (unpublished draft on file with the Virginia Law Review Association).

¹³¹ For commentary on this issue, compare Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 *Cardozo L. Rev.* 989, 1010 (1999) (arguing that *Chevron* should not apply "when an agency is asserting authority outside its core powers"), with Quincy M. Crawford, Comment, *Chevron Deference to Agency Interpretations that Delimit the Scope of the Agency's Jurisdiction*, 61 *U. Chi. L. Rev.* 957, 958 (1994) (arguing that *Chevron* should apply to scope-of-authority issues).

¹³² See Sunstein, *supra* note 7, at 2099.

¹³³ See *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380–82 (1988) (Scalia, J., concurring); see also *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 54 (1990) (White, J., dissenting) (endorsing Justice Scalia's position and noting that "*Chevron* itself and several of our cases decided since *Chevron* have deferred to agencies' determinations of matters that affect their own statutory jurisdiction"); Merrill, *supra* note 72, at 998 ("[A] 'jurisdictional questions' exception to *Chevron* would either swallow the rule or lead to arbitrary decisions based on explication of a notorious formalism ('jurisdiction').").

¹³⁴ In *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000), both the majority and the dissent agreed that *Chevron* governed the Court's evaluation of the FDA's assertion of authority to regulate tobacco products.

mestic areas.”¹³⁵ Moreover, congressional delegations of authority may overlap with the executive branch’s independent lawmaking powers in this area, and courts generally presume that Congress does not intend to interfere with the executive branch’s powers.¹³⁶ For these reasons, courts have in fact tended to give *Chevron*-like deference to executive branch interpretations concerning the scope of delegated foreign affairs authority.¹³⁷

This scope-of-authority issue arose recently in connection with 1998 amendments to the Foreign Sovereign Immunities Act.¹³⁸ These amendments, enacted as “Section 117” of an appropriations act, subject otherwise-blocked foreign government assets to attachment and execution in certain suits against state sponsors of terrorism and direct the executive branch to assist judgment creditors in those cases. The amendments contain a subsection providing that “[t]he President may waive the requirements of this section in the interest of national security.”¹³⁹ Invoking this subsection, President Clinton purported to waive all of the requirements of Section 117, stating that these requirements “would impede the

¹³⁵ *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); see also, e.g., *Haig v. Agee*, 453 U.S. 280, 291–92 (1981) (quoting *Zemel*); *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1438 (9th Cir. 1996) (same). A recent example is a statutory provision enacted in 1996 that gives the Secretary of State broad discretion to designate “foreign terrorist organization[s].” See 8 U.S.C.A. § 1189(a)(1) (West 1999); see also *People’s Mojahedin Org. of Iran v. United States Dep’t of State*, 182 F.3d 17 (D.C. Cir. 1999) (analyzing this provision).

¹³⁶ See, e.g., *Department of the Navy v. Egan*, 484 U.S. 518, 529–30 (1988).

¹³⁷ See, e.g., *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 233 (1986) (deferring to executive branch regarding statutory duties of Secretary of Commerce); *CIA v. Sims*, 471 U.S. 159, 169–73 (1985) (deferring to executive branch regarding CIA’s statutory authority); *Regan v. Wald*, 468 U.S. 222, 232 (1984) (deferring to the executive branch regarding President’s statutory authority to regulate transactions with Cuba); see also *Abourezk v. Reagan*, 785 F.2d 1043, 1063 (D.C. Cir. 1986) (Bork, J., dissenting) (“This principle of [*Chevron*] deference applies with special force where the subject of that analysis is a delegation to the Executive of authority to make and implement decisions relating to the conduct of foreign affairs.”). It is important to keep in mind, however, that *Chevron* deference is triggered only if the statute is ambiguous. Thus, the *Chevron* doctrine would not allow avoidance of a clear statutory limit on an agency’s (or the executive branch’s) scope of authority. See Crawford, *supra* note 131, at 971. Moreover, even when triggered, *Chevron* deference only requires that courts accept reasonable interpretations.

¹³⁸ See 28 U.S.C.A. §§ 1610(f)(1)(A)–(B), (2)(A)–(B) (West 1999).

¹³⁹ *Id.* § 117(d).

ability of the President to conduct foreign policy in the interest of national security."¹⁴⁰

In defending the President's determination that the phrase "of this section" refers to all of Section 117 and not just the government-assistance provision, the Justice Department invoked *Chevron*, arguing that "[t]he President's interpretation of his own statutory authority is entitled to a deference at least as great as that accorded agencies, if not greater" and that the President's interpretation here was "at least a reasonable one."¹⁴¹ A federal district court rejected this *Chevron* argument, asserting that "the principle enunciated by the Supreme Court in *Chevron* does not apply to the case at hand."¹⁴² The court offered no real explanation for its assertion, but it appeared to believe that *Chevron* should not apply when determining the scope of authority Congress has delegated.¹⁴³ As indicated above, however, *Chevron* probably does extend to scope-of-authority issues, and there are particularly good arguments for applying it to such issues in the foreign affairs context.¹⁴⁴ Resolution of this issue will have to await another case, as the

¹⁴⁰ Presidential Determination No. 99-1, 63 Fed. Reg. 59,201 (1998). In a separate statement, the President expressed several specific foreign policy concerns regarding Section 117. See Statement of President, Oct. 24, 1998 (available in 1998 WL 743759, at *7-8).

¹⁴¹ Statement of Interest of the United States Regarding Plaintiffs' Writ of Execution Served Upon AT&T Corp. at 19-20, *Alejandro v. Republic of Cuba* 42 F. Supp. 2d 1317 (S.D. Fla. 1999) (No. 96-10126-Civ-King) [hereinafter Statement of Interest]. The Justice Department also argued that the President's interpretation of the waiver provision was supported by the *Charming Betsy* canon, see *infra* notes 146-148, because it would help the United States avoid treaty violations. See Statement of Interest, *supra*, at 16.

¹⁴² *Alejandro v. Republic of Cuba*, 42 F. Supp. 2d 1317, 1334 (S.D. Fla. 1999), *rev'd* on other grounds, *Alejandro v. Telefonica Larga Distancia de P.R.*, 183 F.3d 1277 (11th Cir. 1999).

¹⁴³ See *id.* at 1334 (stating that the President's "interpretation of the breadth of that waiver cannot belie the legislative authority from which it stems").

¹⁴⁴ See *supra* note 133 and accompanying text. The district court may have been frustrated by what it perceived as a change of position by President Clinton. The court "note[d] with great concern that the very President who in 1996 decried this terrorist action by the Government of Cuba now sends the Department of Justice to argue before this Court that Cuba's blocked assets ought not to be used to compensate the families of the U.S. nationals murdered by Cuba." *Alejandro*, 42 F. Supp. 2d at 1332 n.16. The *Chevron* framework, however, as discussed earlier, allows for changes of position by the executive branch.

Eleventh Circuit recently reversed and vacated the district court decision on other grounds.¹⁴⁵

B. The Charming Betsy Canon

There is a longstanding canon of construction requiring that federal statutes be construed, where reasonably possible, so that they do not conflict with international law.¹⁴⁶ One of the Supreme Court's earliest applications of the canon was in *Murray v. The Schooner Charming Betsy*,¹⁴⁷ and the canon is often referred to as the "*Charming Betsy* canon."¹⁴⁸ The canon continues to be well accepted, and both the Supreme Court and lower courts apply it fairly regularly. Indeed, lower court application of the canon appears to be on the rise, perhaps because the number of potential conflicts between federal statutory law and international law has been growing.

The relationship between the *Charming Betsy* canon and *Chevron* deference is uncertain. In some cases, these rules may simply reinforce one another—an agency construction of a statute that also avoids a violation of international law may warrant particular deference.¹⁴⁹ The difficulty arises when an agency construction is

¹⁴⁵ See *Alejandro v. Telefonica Larga Distancia de P.R.*, 183 F.3d 1277, 1290 (11th Cir. 1999). Recently, the United States District Court for the District of Columbia upheld the executive branch's construction of the waiver provision. In addition to relying on the plain language of the statute, the court noted that it was reasonable to interpret the waiver provision broadly "given the deference traditionally afforded the President in the oft-sensitive area of foreign relations." *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 26 (D.D.C. 1999).

¹⁴⁶ For general discussions of the canon, see Bradley, *Charming Betsy* Canon, *supra* note 13; Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 *Vand. L. Rev.* 1103 (1990); and Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 *Hastings L.J.* 185 (1993).

¹⁴⁷ 6 U.S. (2 Cranch) 64 (1804).

¹⁴⁸ *Id.* at 117–18. The Court actually phrased the canon in stronger terms—"[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains," *id.* at 118—but the formulation in the text of this Article probably comes closer to actual judicial practice. See Bradley, *Charming Betsy* Canon, *supra* note 13, at 490–91. For an especially strong application of the *Charming Betsy* canon, see *United States v. PLO*, 695 F. Supp. 1456 (S.D.N.Y. 1988).

¹⁴⁹ For recent decisions to this effect, see, e.g., *George E. Warren Corp. v. EPA*, 159 F.3d 616, 624 (D.C. Cir. 1998); *Federal Mogul Corp. v. United States*, 63 F.3d 1572, 1581–82 (Fed. Cir. 1995). But cf. *Earth Island Inst. v. Daley*, 48 F. Supp. 2d 1064, 1078 (Ct. Int'l Trade 1999) (refusing to defer, notwithstanding the *Charming Betsy* canon, because the court found the statute to be clear). For an unusual decision holding that

contrary to international law and the two rules are therefore in conflict. A mistaken citation in a Supreme Court opinion has, unfortunately, confused matters. In *NLRB v. Catholic Bishop of Chicago*,¹⁵⁰ the Court, in invoking the *constitutional avoidance* canon, stated as follows: "In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804), by holding that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."¹⁵¹ But there is no such admonition in the *Charming Betsy* decision, only the admonition about not violating international law. The phrasing of the *Charming Betsy* canon is similar to the phrasing of the constitutional avoidance canon, and it is possible that this caused the Court in *Catholic Bishop* to include the mistaken reference.¹⁵² Whatever the reason, the Court unfortunately repeated the mistaken citation in *DeBartolo*, which, as discussed above, held that the constitutional avoidance canon trumps *Chevron* deference.¹⁵³ In explaining the constitutional avoidance canon in *DeBartolo*, the Court said that the canon "has its roots in" the *Charming Betsy* opinion, and then cited, among other things, *Catholic Bishop*.¹⁵⁴

This mistaken citation has led at least one commentator, as well as the Court of International Trade in several decisions, to conclude that the Supreme Court has already held that the *Charming*

Charming Betsy is inapplicable to the context of international trade law, see *Mississippi Poultry Ass'n v. Madigan*, 992 F.2d 1359, 1367 (5th Cir. 1993).

¹⁵⁰ 440 U.S. 490 (1979).

¹⁵¹ *Id.* at 500.

¹⁵² I have checked the briefs, and neither the parties nor the *amici curiae* in *Catholic Bishop* cited the *Charming Betsy* decision.

¹⁵³ See *supra* text accompanying note 109.

¹⁵⁴ *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988); see also *Steel Co. v. United States*, 523 U.S. 83, 133 (1998) (Stevens, J., concurring) (quoting this sentence from *DeBartolo*); *United States v. IBM Corp.*, 517 U.S. 843, 868 (1996) (Kennedy, J., dissenting) (citing *Charming Betsy* for the constitutional avoidance canon, immediately before quoting from *DeBartolo*); *Concrete Pipe and Prods. of Cal. v. Construction Laborers of Pension Trust for S. Cal.*, 508 U.S. 602, 629 (1993) (citing *Charming Betsy* as a "Cf." cite in support of the constitutional canon); *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 280 (1991) (White, J., dissenting) (citing *Charming Betsy* in support of the constitutional canon, immediately after a citation to *DeBartolo*).

Betsy canon trumps *Chevron* deference.¹⁵⁵ In fact, there is little reason to believe that the Court has yet focused on that issue. The Court had never cited *Charming Betsy* for the constitutional avoidance canon prior to *Catholic Bishop*, and it has never explained how *Charming Betsy* is in fact relevant to the constitutional canon. Moreover, it has cited the *Charming Betsy* decision correctly a number of times (for the international law conflict avoidance rule), without referring to the constitutional canon.¹⁵⁶

In addition, important differences between the constitutional avoidance canon and the *Charming Betsy* canon suggest that they should not have the same relationship to *Chevron* deference. First, while Congress may not violate the Constitution, it is well established that Congress can violate international law. The Supreme Court has directly held this with respect to treaties,¹⁵⁷ and both Supreme Court dicta and unanimous lower court authority support this with respect to customary international law.¹⁵⁸ Since statutory violations of international law will not be overturned by the judiciary, the *Charming Betsy* canon does not seem to implicate the same separation-of-powers concerns implicated by the constitutional avoidance canon.

Second, while administrative agencies have no special expertise in constitutional determination, the executive branch does have substantial expertise with respect to international law—indeed,

¹⁵⁵ See Ronald A. Brand, Direct Effect of International Economic Law in the United States and European Union, 17 Nw. J. Int'l L. & Bus. 556, 571 n.76 (1996/97); Hyundai Elecs. Co. v. United States, 53 F. Supp. 2d 1334, 1344 (Ct. Int'l Trade 1999); see also Footwear Distribs. and Retailers of Am. v. United States, 852 F. Supp. 1078, 1091 (Ct. Int'l Trade 1994). But see Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660, 667 (Fed. Cir. 1992) (refusing to override Commerce Department's otherwise permissible construction of international trade statute based on potential conflict with GATT).

¹⁵⁶ See, e.g., *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953).

¹⁵⁷ See *Breard v. Greene*, 523 U.S. 371, 376 (1998); *Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 600 (1889); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Edye v. Robertson* (The Head Money Cases), 112 U.S. 580, 597 (1884).

¹⁵⁸ See, e.g., *Galo-Garcia v. INS*, 86 F.3d 916, 918 (9th Cir. 1996); *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir.), cert. denied, 575 U.S. 1022 (1986); see also *The Paquete Habana*, 175 U.S. 677, 700 (1900) (stating that courts are to apply customary international law "where there is no treaty, and no controlling executive or legislative act or judicial decision").

more expertise than either of the other two branches. The executive branch is considered this nation's principal representative with respect to international law matters, and courts generally give substantial weight to executive branch interpretations of international law.¹⁵⁹

Third, the idea that some canons should trump *Chevron* deference in order to limit delegations of lawmaking authority to agencies has less force in the area of foreign affairs. The Supreme Court has long recognized that, because of practical necessity and executive branch expertise, Congress may need to delegate especially broad foreign affairs powers to the Executive.¹⁶⁰ For these reasons, it is far from clear (as one commentator has asserted) that, in light of the *Charming Betsy* canon, "congressional silence should mean that Congress wants the President to follow international law rules as law of the land."¹⁶¹

If the *Charming Betsy* canon does indeed trump *Chevron* deference, it must be because Congress itself rather than administrative agencies should deliberate on whether to violate international law. It is arguable that this should be the case when the potential conflict is with a self-executing treaty. Such treaties are equal in status to federal statutes, and there is a presumption against implied repeal of a federal statute.¹⁶² If the presumption against implied

¹⁵⁹ See *infra* Part IV.

¹⁶⁰ See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) ("[C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."); see also *Clinton v. City of New York*, 524 U.S. 417, 445 (1998) ("[T]his Court has recognized that in the foreign affairs arena, the President has 'a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.'" (quoting *Curtiss-Wright*). By relying on *Curtiss-Wright* for this point, I am not endorsing other aspects of the *Curtiss-Wright* reasoning, especially the Court's suggestion that the enumerated powers structure of the Constitution does not apply in the foreign affairs context. See 299 U.S. at 318. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("The President's power . . . must stem either from an act of Congress or from the Constitution itself.").

¹⁶¹ Lobel, *supra* note 33, at 1120. See also Ralph G. Steinhardt, *The Internationalization of Domestic Law*, in *The Alien Tort Claims Act: An Analytical Anthology* 41 (Ralph G. Steinhardt & Anthony D'Amato eds., 1999) (arguing that *Charming Betsy* should trump *Chevron*).

¹⁶² See, e.g., *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

repeal is designed to force Congress itself to make the repeal decision—to promote continuity in enacted law, for example¹⁶³—then it might trump *Chevron* just like the constitutional avoidance canon and similar rules discussed above.¹⁶⁴ There is a suggestion in at least one Supreme Court decision to this effect.¹⁶⁵ It is not clear, however, why *Charming Betsy* should trump *Chevron* deference with respect to violations of other forms of international law (non-self-executing treaties and customary international law). Violations of those forms of law, after all, do not substantially implicate domestic legal continuity; instead, they implicate foreign relations issues that would seem to fall within the expertise of the executive branch.¹⁶⁶

A series of lower court decisions involving the Immigration and Naturalization Service's ("INS") detention of the Mariel Cubans (Cuban citizens who arrived in the United States during the 1980 boatlift originating from the port of Mariel, Cuba) provides precedent for this conclusion. The Cuban detainees have claimed that

¹⁶³ See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921, 944 (1992).

¹⁶⁴ See *supra* Part II.C.

¹⁶⁵ See *TWA v. Franklin Mint Corp.*, 466 U.S. 243, 254 (1984) (stating that the Court would uphold a liability limit conversion rate followed by the Civil Aeronautics Board "unless we find it to be contrary to law established by domestic legislation or by the [Warsaw] Convention itself"). See also Richard L. Doernberg, *Treaty Override by Administrative Regulation: The Multiparty Financing Regulations*, 2 Fla. Tax Rev. 521, 542 (1995) (arguing that *TWA* stands for the proposition that Congress cannot implicitly delegate to agencies the authority to override self-executing treaties). It should be noted, however, that the Court was not faced in that case with a conflict between an executive branch interpretation and a self-executing treaty: The executive branch took the position that the Convention's liability limit remained enforceable in the United States, see *TWA*, 466 U.S. at 253, and the Court found (over Justice Stevens' dissent) that the Board's conversion method was consistent with the Convention. See *id.* at 261.

¹⁶⁶ The British House of Lords has addressed this precise issue under British law and has concluded that the British equivalent of the *Charming Betsy* canon does not trump the British equivalent of *Chevron* deference. See *Regina v. Secretary of State for the Home Dep't, Ex parte Brind*, 2 W.L.R. 588 (H.L. 1991) (appeal taken from C.A.). The Law Lords in that case reasoned that a contrary conclusion would allow incorporation of international law into British statutory law "by the back door" and would amount to "judicial usurpation of the legislative function." See *id.* at 605, 592 (opinions of Lords Ackner and Bridge). It is worth noting, however, that, unlike the United States, Great Britain deems all treaties to be non-self-executing. So, once again, special treatment may be warranted in the United States for self-executing treaties.

the INS should be compelled to release them because their detention is in violation of customary international law. Almost all courts that have considered this claim have rejected it.¹⁶⁷ These courts have relied in part on what they have determined to be an *implicit* delegation by Congress to the INS of authority to detain the Cubans, notwithstanding a potential conflict with customary international law.¹⁶⁸ Although these decisions do not specifically address the relationship between *Chevron* deference and the *Charming Betsy* canon, they appear to assume that *Charming Betsy* is inapplicable in this context.¹⁶⁹ As the Office of Legal Counsel has explained, these decisions “may be understood as holding that the Executive acting within broad statutory discretion may depart from customary international law, even in the absence of an affirmative decision by Congress that international law may be violated.”¹⁷⁰

¹⁶⁷ See, e.g., *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1451 (9th Cir. 1995); *Gisbert v. United States Attorney Gen.*, 988 F.2d 1437, 1448 (5th Cir. 1993); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir. 1986). But see *Fernandez v. Wilkinson*, 505 F. Supp. 787, 799–800 (D. Kan. 1980), *aff’d* on other grounds, 654 F.2d 1382 (10th Cir. 1981).

¹⁶⁸ See, e.g., *Barrera-Echavarria*, 44 F.3d at 1445 (“Because the Attorney General’s construction of the relevant statutory provisions is reasonable and Congress has not acted to restrict detention authority despite being well aware of executive practice, we have little difficulty concluding that Barrera’s continuing detention is authorized by statute.”).

¹⁶⁹ The Supreme Court recently considered an immigration case in which there was a potential conflict between *Chevron* deference and the *Charming Betsy* canon. In arguing that the INS’s interpretation of a statutory provision should be rejected, the respondent and his *amici curiae* specifically relied on the *Charming Betsy* canon. The Court did not resolve this issue, however, because it concluded that there was no conflict with international law. See *INS v. Aguirre-Aguirre*, 119 S. Ct. 1439, 1446–47 (1999) (finding no conflict between INS’s regulations and the United Nations Convention Relating to the Status of Refugees and observing that a United Nations handbook relied upon by the lower court “may be a useful interpretative aid, but it is not binding on the Attorney General, the [Board of Immigration Appeals], or United States courts”).

¹⁷⁰ Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities, 13 Op. Off. Legal Counsel 163, 174 (1989) [hereinafter OLC, 1989 Memorandum]. This memorandum is discussed in more detail below, see *infra* notes 208–216 and accompanying text. The Office of Legal Counsel was referring specifically to the *Garcia-Mir* decision cited above in note 167.

C. Presumption Against Extraterritoriality

The Supreme Court has long employed a presumption that federal statutes do not apply "extraterritorially" to conduct occurring outside the territorial boundaries of the United States.¹⁷¹ To overcome this presumption, the party claiming extraterritorial application must show "the affirmative intention of the Congress clearly expressed."¹⁷² The Court has not been entirely consistent in its application of this presumption, failing to invoke it, for example, in the context of antitrust law.¹⁷³ In addition, a number of academic commentators have questioned the continued legitimacy of the presumption in light of changes in international law, choice-of-law principles, and United States regulatory interests.¹⁷⁴ Nevertheless, the presumption against extraterritoriality continues to be a well-entrenched rule of statutory construction. The Supreme Court strongly reaffirmed the presumption in its 1991 *Aramco* decision¹⁷⁵ and has relied on it in two subsequent decisions.¹⁷⁶ Lower courts also regularly apply the presumption.¹⁷⁷

The Supreme Court has not directly addressed the relationship between the presumption against extraterritoriality and *Chevron*

¹⁷¹ See, e.g., *EEOC v. Arabian Am. Oil Co. ("Aramco")*, 499 U.S. 244, 248 (1991); *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909).

¹⁷² *Aramco*, 499 U.S. at 248 (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

¹⁷³ See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); see also *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 3-4 (1st Cir. 1997) (refusing to apply the presumption to restrain criminal enforcement of antitrust laws), cert. denied, 550 U.S. 1044 (1998).

¹⁷⁴ See, e.g., Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 *Law & Pol'y Int'l Bus.* 1, 1-2 (1992); Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 *Sup. Ct. Rev.* 179, 223-24; Jonathan Turley, "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality, 84 *Nw. U. L. Rev.* 598, 656-60 (1990).

¹⁷⁵ See *Aramco*, 499 U.S. at 248.

¹⁷⁶ See *Sale v. Haitian Centers Council*, 509 U.S. 155, 173 (1993); *Smith v. United States*, 507 U.S. 197, 203-04 (1993).

¹⁷⁷ See, e.g., *Nieman v. Dryclean U.S.A. Franchise Co.*, 178 F.3d 1126, 1129 (11th Cir. 1999) (Federal Trade Commission Act), cert. denied, 120 S. Ct. 938 (2000); *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1095 (9th Cir.) (Copyright Act), cert. denied, 513 U.S. 1001 (1994); *United States v. Javino*, 960 F.2d 1137, 1142 (2d Cir.) (National Firearms Act), cert. denied, 506 U.S. 979 (1992); *Independent Union of Flight Attendants v. Pan American World Airways*, 923 F.2d 678, 680 (9th Cir. 1991) (Railway Labor Act).

deference. This issue came up in the *Aramco* case, in which the Court had to decide whether to defer to the Equal Employment Opportunity Commission's ("EEOC") extraterritorial interpretation of Title VII of the Civil Rights Act of 1964. A majority of the Court found *Chevron* inapplicable there, however, because the EEOC lacks rulemaking power and thus, according to the majority, was entitled only to the lower *Skidmore* "persuasiveness" deference.¹⁷⁸ The majority found that the EEOC's interpretation "did not fare well" under the *Skidmore* standard, in part because the EEOC had changed its position.¹⁷⁹ Although the majority said that it did not "wholly discount" the EEOC's interpretation, it concluded that the interpretation was "insufficiently weighty to overcome the presumption against extraterritorial application."¹⁸⁰ It is not clear whether the majority would have concluded differently had it found *Chevron* applicable. And there is little lower court precedent one way or the other.¹⁸¹

In a concurrence in *Aramco*, Justice Scalia questioned the majority's decision not to apply *Chevron* but concluded that, in any event, the EEOC's extraterritorial interpretation was not reasonable under Step Two of *Chevron* because it conflicted with the presumption against extraterritoriality.¹⁸² Scalia, in other words, be-

¹⁷⁸ See *Aramco*, 499 U.S. at 257, citing *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). Notwithstanding *Aramco*, the D.C. Circuit has expressed the view that *Chevron* deference should *not* be limited to agencies with rulemaking power. See, e.g., *Trans Union Corp. v. FTC*, 81 F.3d 228, 230 (D.C. Cir. 1996). Other circuits have held to the contrary. See, e.g., *Merck & Co. v. Kessler*, 80 F.3d 1543, 1550 (Fed. Cir. 1996), cert. denied, 519 U.S. 1101 (1997); *Atchison, Topeka & Santa Fe Ry. Co. v. Peña*, 44 F.3d 437, 441-42 (7th Cir. 1994) (en banc), aff'd on other grounds, 516 U.S. 152 (1996).

¹⁷⁹ See *Aramco*, 499 U.S. at 257. The level of deference under the *Skidmore* standard "depend[s] upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

¹⁸⁰ *Aramco*, 499 U.S. at 258.

¹⁸¹ In two pre-*Aramco* decisions involving independent agencies, the D.C. Circuit held that the presumption against extraterritoriality limited *Chevron* deference. See *infra* note 213. By contrast, the Second Circuit recently suggested that *Chevron* deference applied to the Securities and Exchange Commission's extraterritorial interpretation of a statute. See *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 123 & n.3 (2d Cir. 1998), cert. denied, 119 S. Ct. 1029 (1999).

¹⁸² See *Aramco*, 499 U.S. at 259-60 (Scalia, J., concurring).

lieved that the presumption against extraterritoriality would trump *Chevron* deference, although he did not explain why this would be so. Scalia cited to an article by Professor Sunstein, in which Sunstein observed in passing that the presumption against extraterritoriality presumably trumps *Chevron* deference because the presumption "is designed to produce a clear statement from Congress."¹⁸³ In a more recent article, Sunstein expanded slightly upon this explanation. Sunstein suggested that the presumption against extraterritoriality should act as a nondelegation principle, and thus trump *Chevron*, because "extraterritorial application calls for extremely sensitive judgments involving international relations; such judgments must be made via the ordinary lawmaking process (in which the President of course participates). The executive may not make this decision on its own."¹⁸⁴

One obvious problem with the Scalia-Sunstein explanation is that it is conclusory—it asserts that extraterritoriality calls for a certain type of judgment and then concludes, without further explanation, that this judgment must be made by Congress. More importantly, it runs up against general understandings regarding executive branch authority and expertise, which suggest, contrary to the Scalia-Sunstein explanation, that the Executive can indeed make decisions that involve "extremely sensitive judgments involving international relations." Indeed, if anything, there are a number of reasons to prefer that the executive branch, not Congress, make those decisions, such as the executive branch's better access to relevant information.

Admittedly, the Supreme Court has suggested that the presumption against extraterritoriality is designed in part to prompt Congress to address the extraterritoriality issue more directly.¹⁸⁵ The principal reason for this suggestion, however, appears to be the Court's belief that Congress is institutionally better suited *than the judiciary* to determine whether and to what extent to apply

¹⁸³ Sunstein, *supra* note 7, at 2114–15.

¹⁸⁴ Sunstein, *supra* note 112, at 333.

¹⁸⁵ See Curtis A. Bradley, Territorial Intellectual Property Rights in an Age of Globalism, 37 Va. J. Int'l L. 505, 550–55 (1997). For skepticism about whether the presumption is in fact likely to have such a prompting effect, see Jack L. Goldsmith, The New Formalism in United States Foreign Relations Law, 70 U. Colo. L. Rev. 1395, 1424–29 (1999).

United States law abroad. The Court has expressed reluctance at “run[ning] interference in such a delicate field of international relations”¹⁸⁶ and has observed that “Congress . . . [is] able to calibrate its provisions in a way that we cannot.”¹⁸⁷ These institutional concerns may explain why courts should apply the presumption against extraterritoriality as a matter of general statutory interpretation: doing so might allow courts to avoid certain issues that they are ill-equipped to resolve, or that look too much like policymaking. But this explanation does not weigh against giving *Chevron* deference to an extraterritorial interpretation by the executive branch. In other words, this explanation reflects a desire to push certain issues away from the courts, not a preference for congressional as opposed to Executive determination.¹⁸⁸

D. “Controlling Executive Acts”

The above analysis suggests that, as a general matter, neither the *Charming Betsy* canon nor the presumption against extraterritoriality should override *Chevron* deference (with the possible exception, as noted, for applications of the *Charming Betsy* canon to avoid conflicts with self-executing treaties). These rules, unlike certain other canons (such as the constitutional avoidance canon), do not undercut *Chevron*’s presumed delegation. They are not founded on constitutional or other concerns that suggest a need for congressional as opposed to Executive resolution. And the executive branch has foreign relations expertise and authority, so it would seem to be well suited to determine the international-law-conflict and extraterritoriality issues along with the other issues presumed to be delegated to it.

This conclusion, however, may not apply to all executive branch agencies. While the President and State Department have expertise

¹⁸⁶ *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957).

¹⁸⁷ *Aramco*, 499 U.S. at 259 (emphasis added).

¹⁸⁸ The extraterritoriality issue could be characterized as a “scope of authority” issue rather than a pure interpretation issue. For the reasons mentioned above, however, it is not clear that *Chevron* deference should turn on this distinction, at least in the context of foreign affairs. See *supra* notes 131–137 and accompanying text. For an argument, in a somewhat different context, that extraterritoriality concerns the substantive meaning of a statute rather than jurisdiction, see *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting).

concerning these foreign relations issues, this is not true of all components of the executive branch. Nor is it clear that all components of the executive branch, such as independent agencies, are acting as agents for the President when making foreign relations decisions.¹⁸⁹ As a result, it may not in fact make sense (to return to an example discussed above) to defer to the EEOC regarding extraterritoriality, even without regard to whether it has rulemaking authority. The EEOC, after all, has expertise in labor policy, not foreign relations policy, and it does not act as a direct agent of the President.¹⁹⁰

There is already an analytical framework in place that speaks to this issue. This framework stems from the longstanding debate over whether the President has the constitutional authority to violate customary international law.¹⁹¹ The Supreme Court stated in its famous 1900 decision, *The Paquete Habana*,¹⁹² that customary international law is "part of our law," and that courts should give effect to it in the absence of a "controlling executive or legislative act."¹⁹³ There has been much debate over whether this statement means that the President can violate customary international law and, if so, what constitutes a "controlling executive act."¹⁹⁴ As Professor Goldsmith and I have suggested elsewhere, this debate may be largely beside the point.¹⁹⁵ Customary international law is directly binding on the executive branch only if it is included in the "Laws" that Article II of the Constitution directs the President to faithfully execute,¹⁹⁶ and there are many reasons to think that cus-

¹⁸⁹ See generally W. Craig Bledsoe & Leslie Rigby, Government Agencies and Corporations, in *Cabinets and Counselors: The President and the Executive Branch* 141 (2d ed. 1997) ("Independent regulatory agencies are governed by bipartisan commissions of five or more members. These commissioners usually serve lengthy, fixed terms, and they cannot be removed by the president.").

¹⁹⁰ This point may explain Justice Scalia's concurrence in *Aramco*. See *supra* note 182 and accompanying text.

¹⁹¹ See *supra* note 31.

¹⁹² 175 U.S. 677 (1900).

¹⁹³ *Id.* at 700.

¹⁹⁴ See *supra* note 31.

¹⁹⁵ See Curtis A. Bradley & Jack L. Goldsmith, III, The Current Illegitimacy of International Human Rights Litigation, 66 *Fordham L. Rev.* 319, 352 (1997).

¹⁹⁶ See U.S. Const. art. II, § 3 (directing the President to "take Care that the Laws be faithfully executed").

tomary international law is not so included.¹⁹⁷ If not, then executive branch acts could not be invalid merely because they violated customary international law, and there would be no reason to consider whether the acts were "controlling" or not.

There is nothing to the contrary in *The Paquete Habana*. The Court there was not discussing whether or to what extent customary international law binds the executive branch under Article II, just the circumstances under which courts could apply customary international law as pre-*Erie* general common law.¹⁹⁸ The seizure of the fishing boat at issue in *The Paquete Habana* was in fact found to be *contrary* to executive branch policy; there was thus no real conflict in that case between the executive branch and international law.¹⁹⁹ And, with the exception of a twenty-year-old district court decision,²⁰⁰ no court since *The Paquete Habana* has purported to overrule an executive branch action by direct application of customary international law.

¹⁹⁷ One reason is constitutional text. See *supra* notes 34–37 and accompanying text.

¹⁹⁸ In several pre-*Erie* decisions, the Supreme Court made clear that customary international law had the status in U.S. courts of general common law, not federal law. See, e.g., *Ker v. Illinois*, 119 U.S. 436, 444 (1886) (holding that the question whether forcible seizure of a criminal defendant in a foreign country is a ground to resist trial in state court is "a question of common law, or of the law of nations" that the Court has "no right to review"); *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, 286–87 (1875) (holding that the Court lacked jurisdiction to review issues concerning "the general laws of war, as recognized by the law of nations" because such issues did not involve "the constitution, laws, treaties, or executive proclamations of the United States," but rather concerned only "principles of general law alone"); see also Restatement (Third), *supra* note 15, introductory note at 41 (summarizing briefly the pre-*Erie* history).

¹⁹⁹ See *The Paquete Habana*, 175 U.S. at 712 (noting that a presidential proclamation had "clearly manifest[ed] the general policy of the Government to conduct the war in accordance with the principles of international law sanctioned by the recent practice of nations"); see also *Garcia-Mir v. Meese*, 788 F.2d 1446, 1454 (11th Cir. 1986) (noting this point); Michael J. Glennon, *Can the President Do No Wrong?*, 80 Am. J. Int'l L. 923, 923 n.6 (1986) (same). The President can, of course, look to international law in regulating the conduct of the executive branch, assuming that such regulation does not violate federal constitutional or statutory law. A recent example is an executive order by the Clinton Administration designed to promote executive branch implementation of human rights treaties. See Exec. Order No. 13,107, 3 C.F.R. 234 (1998). Another recent example is a presidential proclamation extending U.S. authority to regulate offshore to the limits allowed by customary international law. See Proclamation No. 7219, 64 Fed. Reg. 48,701 (1999).

²⁰⁰ See *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980), *aff'd* on other grounds, 654 F.2d 1382 (10th Cir. 1981).

The “controlling executive act” issue may be relevant, however, to the relationship between *Chevron* deference and the foreign affairs canons. *Chevron* deference depends on there being a presumed delegation of interpretive authority to the executive branch entity.²⁰¹ Whether such a delegation should be presumed with respect to international law compliance or extraterritoriality may well turn on something like the “controlling executive act” analysis.

This point is illustrated by the controversial issue of the Federal Bureau of Investigation’s (“FBI”) authority to make arrests in foreign countries without those countries’ consent. A federal statute provides that “[t]he Attorney General may appoint officials to detect and prosecute crimes against the United States.”²⁰² Another statute gives FBI agents the authority to “make arrests . . . for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.”²⁰³ Neither statute contains an explicit geographic limitation or an explicit directive to comply with international law. Nevertheless, in a 1980 memorandum opinion to the Attorney General, the Office of Legal Counsel (“OLC”) concluded that the FBI lacks statutory authority to make arrests in foreign countries without those countries’ consent.²⁰⁴ This conclusion was based on two grounds. First, the memorandum reasoned that an arrest in a foreign country without the country’s consent would violate international law, and that it would be unreasonable to construe general statutory language as authorizing

²⁰¹ See *supra* text accompanying notes 81–84.

²⁰² 28 U.S.C. § 533(1) (1994).

²⁰³ 18 U.S.C. § 3052 (1994).

²⁰⁴ See *Extraterritorial Apprehension by the Federal Bureau of Investigation*, 4B Op. Off. Legal Counsel 543, 544 (1980) [hereinafter OLC, 1980 Memorandum]. The Constitution provides that the President “may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.” U.S. Const. art. II, § 2, cl. 1. In addition, the Attorney General is required by statute to advise the President and the heads of executive departments on questions of law. See 28 U.S.C. §§ 511, 512 (1994). The Attorney General has delegated most of her legal advice and opinion-writing responsibilities to the Assistant Attorney General for the Office of Legal Counsel. See 28 C.F.R. § 0.25(a) (1999). In the 1980 memorandum, the OLC referred only to 28 U.S.C. § 533(1), but its analysis presumably was meant to encompass 18 U.S.C. § 3052 as well.

such a violation.²⁰⁵ In other words, the memorandum relied on the *Charming Betsy* canon. A number of academic commentators, citing *Charming Betsy*, have subsequently endorsed this argument.²⁰⁶ Second, the memorandum reasoned (without much explanation) that such an extraterritorial arrest would be beyond the powers of the United States as a whole because it would violate the sovereignty of another nation, and that “the powers of the FBI are delimited by those of the enabling sovereign.”²⁰⁷

The OLC reversed its position on this extraterritorial arrest issue in a 1989 memorandum to the Attorney General.²⁰⁸ The 1989 memorandum first argued that the 1980 memorandum was “clearly wrong” in asserting that the United States as a whole lacks the power to carry out extraterritorial arrests in violation of international law.²⁰⁹ Of more relevance to this Article, the 1989 memorandum also argued that the *Charming Betsy* canon is “wholly inapposite” to the statutes in question.²¹⁰ It reasoned that the FBI is an agency through which the President carries out his constitutional law enforcement duties, that the President himself has the power to violate customary international law, and that “it must be presumed that Congress intended to grant the President’s instrumentality the authority to act in contravention of international law when directed to do so.”²¹¹ Citing *Chevron*, the 1989 memorandum further argued that the decision whether to violate international law when carrying out law enforcement activities is a political decision and that “Congress must be presumed to entrust such vital law enforcement decisions directly to the democratically accountable President and

²⁰⁵ See OLC, 1980 Memorandum, *supra* note 204, at 552.

²⁰⁶ See, e.g., Michael J. Glennon, *State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 Am. J. Int’l L. 746, 752 (1992); Jeanne M. Woods, *Presidential Legislating in the Post-Cold War Era: A Critique of the Barr Opinion on Extraterritorial Arrests*, 14 B.U. Int’l L.J. 1, 37 (1996).

²⁰⁷ OLC, 1980 Memorandum, *supra* note 204, at 553.

²⁰⁸ See OLC, 1989 Memorandum, *supra* note 170. The 1989 Memorandum made clear that it was addressing only the legality of FBI abductions, not “the serious policy considerations that may weigh against carrying out such operations.” *Id.* at 164.

²⁰⁹ *Id.* at 168. As the 1989 Memorandum noted, the Supreme Court and lower federal courts have held in a number of cases (and most commentators agree) that Congress and the President, acting jointly, have the authority to violate international law. See *supra* notes 157–158 and accompanying text.

²¹⁰ OLC, 1989 Memorandum, *supra* note 170, at 172.

²¹¹ *Id.*

his subordinates.”²¹² In a footnote, the memorandum distinguished two D.C. Circuit decisions,²¹³ which had applied the presumption against extraterritoriality to trump *Chevron* deference, as involving independent agencies “that exercised statutory authority thought to be shielded from direct presidential control.”²¹⁴ In those cases, the memorandum explained, “the statutory authorities at issue . . . unlike those exercised by the FBI, may not have been understood to effectuate directly the President’s constitutional authority, and thus need not be interpreted as commensurate with that authority.”²¹⁵ The 1989 memorandum then proceeded to argue that, in addition to statutory authority, the President has inherent constitutional power to violate customary international law and that the President can delegate this power to subordinates such as the Attorney General.²¹⁶

The approach I am suggesting concerning the relationship between the *Chevron* doctrine and the foreign affairs canons is similar to the analysis in the OLC’s 1989 memorandum. Under this analysis, *Chevron* deference to the President and his foreign affairs agents concerning the meaning of a statute would not be limited by the foreign affairs canons. Instead, because of the executive branch’s constitutional authority to violate customary international law and its expertise in foreign relations, courts would presume that when Congress has charged the President or his foreign affairs agents with administering a statute, Congress also has delegated interpretive authority over the issues addressed by the canons.²¹⁷

The Supreme Court’s decision in *United States v. Alvarez-Machain*²¹⁸ can be read as a partial endorsement of this approach. That case involved the abduction, at the behest of the United States government, of a criminal suspect residing in Mexico. The

²¹² *Id.* at 173.

²¹³ See *Commodity Futures Trading Comm’n v. Nahas*, 738 F.2d 487, 495 n.17 (D.C. Cir. 1984); *FTC v. Compagnie de Saint Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1322–23 (D.C. Cir. 1980).

²¹⁴ OLC, 1989 Memorandum, *supra* note 170, at 173 n.14.

²¹⁵ *Id.*

²¹⁶ See *id.* at 176–81.

²¹⁷ The one possible exception, as noted above, would be for applications of the *Charming Betsy* canon to avoid conflicts with self-executing treaties. See *supra* text accompanying notes 162–164.

²¹⁸ 504 U.S. 655 (1992).

suspect challenged his prosecution on the ground that his custody had been obtained in violation of international law. In rejecting this challenge, the Supreme Court reaffirmed the *Ker-Frisbie* doctrine, pursuant to which the illegality of a defendant's abduction is not a defense to a criminal prosecution unless the abduction violates a self-executing treaty.²¹⁹ The Court also refused to imply a prohibition on abduction into the extradition treaty between the United States and Mexico. The Court acknowledged that the abduction may have been in violation of customary international law, but the Court said, "the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch."²²⁰ The Court stressed the "advantage of the diplomatic approach" to resolving a situation such as this one "as opposed to unilateral action by the courts of one nation."²²¹ In sum, the Court accepted the executive branch's construction of the extradition treaty, notwithstanding the "backdrop of customary international law" disallowing abductions,²²² and the Court seemed to suggest, consistent with the OLC's 1989 memorandum, that agen-

²¹⁹ See *Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *Cook v. United States*, 288 U.S. 102, 112 (1933); *Ker v. Illinois*, 119 U.S. 436, 444 (1886). See generally Stefan A. Reisenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 Am. J. Int'l L. 892, 893-94 (1980) (explaining the doctrine).

²²⁰ *Alvarez-Machain*, 504 U.S. at 669.

²²¹ *Id.* at 669 n.16. In dissent, Justice Stevens suggested that the Court should not defer to the executive branch's interpretation of the extradition treaty because the executive branch had changed positions in the two OLC memoranda described above. See *id.* at 686-87 n.34 (Stevens, J., dissenting). This argument was a *non sequitur*, since the OLC had changed its position regarding the executive branch's ability to violate customary international law, not whether extraterritorial abductions violate extradition treaties. Indeed, the 1980 Memorandum concluded that such abductions do *not* violate generally-worded extradition treaties, see OLC, 1980 Memorandum, *supra* note 204, at 547, and there is nothing in the 1989 Memorandum taking issue with that conclusion. See OLC, 1989 Memorandum, *supra* note 170, at 164 n.1 ("We do not reconsider any issues addressed by the 1980 Opinion that are not specifically discussed in this memorandum.").

²²² *Alvarez-Machain*, 504 U.S. at 666. In its brief to the Court, the executive branch argued that its construction of the extradition treaty was entitled to deference. See Brief for the United States at 67-68, *Alvarez-Machain* (No. 91-712). The Court did not explicitly give deference to the executive branch's interpretation of the treaty, but it appeared to do so implicitly. See, e.g., Michael J. Weiner, *The Importance of a Clear Rule for Judicial Deference to Executive Interpretations of Treaties: A Defense of United States v. Alvarez-Machain*, 12 Wis. Int'l L.J. 125, 143 (1993). As discussed below, the Supreme Court often gives substantial deference to the executive branch's interpretation of treaties. See *infra* Part IV.

cies of the executive branch acting with presidential authority may violate customary international law.²²³

IV. INTERPRETATION OF INTERNATIONAL LAW

In this Part, I consider judicial deference to the executive branch with respect to the meaning of international law, both treaty-based and customary. Commentary on this issue seems not to have evolved past the point of recognizing and generally bemoaning the fact that courts give substantial deference to the executive branch on such matters. Considering this issue from the perspective of the *Chevron* doctrine may help clarify the judicial practice and provide a basis for imposing limitations on deference.

A. Treaty Interpretation

The Supreme Court has stated in a number of decisions that it gives "great weight" to the executive branch's interpretation of treaties.²²⁴ This is not mere window dressing, but rather is a significant factor in treaty interpretation. Indeed, as Professor David Bederman has noted, judicial deference to the executive branch may be "the single best predictor of interpretive outcomes in American treaty cases."²²⁵ It is not entirely clear from the Court's

²²³ The Court suggested this but did not squarely hold it. The Court was careful to note that the respondent was arguing that customary international law should "inform the interpretation of the Treaty terms," not that it provided an independent basis for dismissing the prosecution. *Alvarez-Machain*, 504 U.S. at 666. Of course, the respondent probably did not raise customary international law as an independent argument because the Supreme Court has not recognized a customary international law exception to the *Ker-Frisbie* doctrine. Like many of the doctrines discussed in this Article, the *Ker-Frisbie* doctrine suggests that customary international law does not have the status in the U.S. legal system of a self-executing treaty.

²²⁴ E.g., *United States v. Stuart*, 489 U.S. 353, 369 (1989); *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 184–85 (1982); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); see also Restatement (Third), *supra* note 15, § 326(2) ("Courts... will give great weight to an interpretation made by the Executive Branch."). The Court has at times used somewhat different language to describe the deference. See, e.g., *El Al Israel Airlines v. Tseng*, 119 S. Ct. 662, 671 (1999) ("[r]espect"); *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933) ("of weight"); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 579 (6th Cir. 1985) (stating that the executive branch's "logical reading" of a treaty "is entitled to considerable deference").

²²⁵ David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. Rev. 953, 1015 (1994).

opinions, however, *why* it accords the executive branch this deference. Self-executing treaties are part of the supreme law of the land, and cases arising under such treaties fall within the Article III and statutory jurisdiction of the federal courts. Moreover, the Court has consistently said that treaty interpretation is not a "political question" outside the scope of judicial review.²²⁶

The conventional explanation for this deference stems from the President's role in representing the United States in its relations with other nations. According to this explanation, the President's representative role includes the authority to determine the United States position concerning the meaning of a treaty; although this interpretation is not binding internally for purposes of United States litigation, courts should be reluctant to deviate from it because doing so will undermine the ability of the nation to speak with one voice in foreign affairs.²²⁷ While this explanation does have some force, it is not entirely satisfactory. Among other things, it would seem to warrant deference only to positions that the executive branch has taken vis-à-vis other nations, and yet the courts have never imposed that limitation. More importantly, this explanation never ties the practical desirability of deference to any constitutional theory. Where does the executive branch obtain the constitutional authority to in effect create law governing Article II treaties without first obtaining additional senatorial advice and consent?

This treaty interpretation deference can be understood, I would argue, as a form of *Chevron* deference. That is, courts are presuming that the United States treaty makers have delegated interpretive power to the executive branch because of its special expertise in foreign affairs.²²⁸ The formal basis for the presumption would be the President's constitutional role in the treaty process, something that goes beyond the President's usual "take care" re-

²²⁶ See, e.g., *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 229-30 (1986); *Baker v. Carr*, 369 U.S. 186, 211-12 (1962).

²²⁷ See, e.g., *Restatement (Third)*, supra note 15, § 326, cmt. a; Henkin, supra note 22, at 206.

²²⁸ Cf. Richard B. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 *Am. J. Int'l L.* 633, 674 (1962) ("The reason for the 'great weight' doctrine is essentially that of 'agency expertise'—a recognition of the Department's special experience in such areas, its frequent rôle as negotiator of such agreements, and its access to confidential facts.").

sponsibilities. The formal analogue in this context to Congress's ability under the *Chevron* framework to limit or override agency interpretations is the Senate's power to attach conditions to its consent to the ratification of treaties, including conditions relating to how the treaty will be interpreted.²²⁹ It is also well established that, for purposes of United States law, Congress as a whole may override treaty obligations and thus may effectively supersede executive branch interpretations of treaties with which it disagrees.²³⁰

Doctrinally, there are a number of ways in which the *Chevron* framework fits well here. First, as under *Chevron*, courts do not defer if they find that the plain language of the treaty clearly resolves the issue,²³¹ or if the executive branch's interpretation is unreasonable.²³² Second, as with statutory interpretation under *Chevron*, the Supreme Court has indicated that when the interpretation of a treaty comes from an agency, the interpretation is entitled to deference only if the agency in question is charged with administering the treaty.²³³ Finally, the *Chevron* framework helps explain a number of apparent anomalies in this deference rule. It explains why, to the puzzlement of some commentators,²³⁴ the Supreme Court has given deference to the executive branch's treaty interpretations even when the executive branch has changed its position.²³⁵ It also helps explain why courts defer to the executive branch on some treaty issues but not others. Issues such as the effect and validity of a Senate reservation and whether a treaty overrides earlier federal legislation are issues not likely to be delegated by the Senate to the executive branch. It is therefore not surprising that courts have not

²²⁹ See generally Kevin C. Kennedy, Conditional Approval of Treaties By the U.S. Senate, 19 Loy. L.A. Int'l & Comp. L.J. 89 (1996) (discussing the history of the Senate's conditional approval of treaties).

²³⁰ See *supra* note 157.

²³¹ See, e.g., *Perkins v. Elg*, 307 U.S. 325, 335–42, 344–49 (1939) (refusing to defer to the Attorney General's interpretation of a naturalization treaty).

²³² See, e.g., *El Al Israel Airlines v. Tseng*, 119 S. Ct. 662, 671 (1999) ("Respect is ordinarily due the *reasonable* views of the Executive Branch concerning the meaning of an international treaty.") (emphasis added).

²³³ For example, the Court has said, "[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies *charged with their negotiation and enforcement* is entitled to great weight." *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 184–85 (1982) (emphasis added).

²³⁴ See, e.g., *Bederman*, *supra* note 67, at 1466–68.

²³⁵ See *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 68–69 (1993).

tended to give *Chevron*-like deference to the executive branch on those issues.²³⁶

At least one lower court has perceived this connection between treaty interpretation deference and *Chevron* deference. In *More v. Intelcom Support Services*,²³⁷ the Fifth Circuit considered whether an employment-related treaty between the United States and the Philippines created private rights of action. In deferring to the views of the Department of Defense on this issue, the court analogized to the *Chevron* doctrine. The court explained, “[i]f ambiguities in statutes drafted by Congress are to be regarded [under *Chevron*] as implicit delegations of authority to the executive, there is no reason not to regard ambiguities in treaties as conscious delegations of authority to the very executive who co-drafted the treaties.”²³⁸ Indeed, the court suggested that such a presumption of delegation may make even more sense with respect to treaties, given the judiciary’s longstanding hesitancy to involve itself in matters of foreign policy.²³⁹ As a result, the court concluded that it should defer to the Department of Defense, the agency charged with enforcing the treaty, as long as its interpretation was reasonable.

Despite its fit with the case law, there is a significant objection to this *Chevron* theory that needs to be addressed. Treaties are, in form, international contracts between nations.²⁴⁰ Why is the delegation question discussed above focused solely on the presumed intent of the United States treaty-makers rather than all of the parties to the contract—parties who might not want to delegate interpretive authority to the United States executive branch? The answer can be found, I would suggest, by first understanding why

²³⁶ Cf. Bederman, *supra* note 67, at 1460–61. Courts may look to the intent of the U.S. treaty-makers as a whole with respect to some of these issues, but that is different from giving *Chevron* deference to the executive branch. Professor Bederman suggests that courts also decline to defer to the executive branch concerning whether a treaty is self-executing; in fact, courts have given the executive branch some deference on this issue, and one court recently analogized this deference to *Chevron* deference. See *infra* note 237 and accompanying text.

²³⁷ 960 F.2d 466 (5th Cir. 1992).

²³⁸ *Id.* at 471–72.

²³⁹ See *id.* at 472.

²⁴⁰ See, e.g., *TWA v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984) (“A treaty is in the nature of a contract between nations.”).

the analogy to domestic contract law is imperfect. In the domestic contract situation, there is one legal regime, not two. An act either is or is not a violation of contract law in this regime. If intent of the parties is the standard used by this regime to judge the legal effect of contracts, the unilateral intent of one party will have no legal effect. In the treaty situation, by contrast, there is both an international legal regime and a domestic legal regime. A party's unilateral intent may have no effect in one regime and yet have legal effect in another. Indeed, as we have seen, the political branches in the United States, at least acting jointly, have the power to make their unilateral treaty interpretations binding in the United States legal system, even if the interpretation is inconsistent with the overall intent of the parties to the treaty.²⁴¹

The United States legal regime, like the international regime, does in fact purport to apply an intent-of-the-parties standard for determining the meaning of substantive treaty terms.²⁴² Even putting aside the deference issue, however, these two regimes differ—for example, United States courts tend to rely more heavily on drafting history than would an international court.²⁴³ More importantly, the United States legal regime tends not to employ an intent-of-the-parties standard for matters concerning the *domestic law effect* of treaties. Thus, for example, although some courts claim that the parties' intent determines whether a treaty is self-executing in the United States legal system, in practice courts rarely look for such intent. Instead, they look to evidence of the United States treatymakers' intent or they focus on the domestic

²⁴¹ See *supra* text accompanying notes 224–230. I am assuming in this discussion the propriety of dualism, that is, a distinction between the international legal system and the U.S. domestic legal system. For a defense of this assumption and an explanation of the ways in which it is reflected in U.S. law, see Bradley, *supra* note 25.

²⁴² See, e.g., *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 185 (1982); Restatement (Third), *supra* note 15, § 325, cmt. 4.

²⁴³ See, e.g., *Sale v. Haitian Centers Council*, 509 U.S. 155, 184–87 (1993); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437–39 (1987); Restatement (Third), *supra* note 15, § 325, cmt. g and reporters' note 4. The Vienna Convention on the Law of Treaties has provisions governing interpretation of treaties, and these provisions allow for the use of drafting history only in limited circumstances. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 32, 1155 U.N.T.S. 332, 340. The United States, however, has not ratified this treaty. Although the provisions of the treaty may reflect customary international law, such law, as is apparent throughout this Article, is not accorded the status in U.S. courts of a self-executing treaty.

desirability of allowing the treaty to be immediately enforceable.²⁴⁴ Courts do not look to the intent of the parties concerning issues such as these because the issues implicate matters of domestic governance, which are not presumed to be determined by the parties as a whole under either international or domestic law.²⁴⁵ For similar reasons, a strong argument can be made that a treaty's presumed delegation of interpretive authority within the United States legal system should be determined by the intent of the United States treaty-makers rather than the intent of the parties as a whole.²⁴⁶

In addition to helping explain judicial deference to the Executive in treaty interpretation, application of the *Chevron* framework may also provide courts with tools for limiting this deference. For example, Step One of *Chevron* would disallow an executive branch interpretation of a treaty that is clearly inconsistent with the terms of the treaty (and thus what the Senate consented to). This issue has come up, for example, in the area of arms control.²⁴⁷ In addi-

²⁴⁴ See, e.g., *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109, 1114-15 (11th Cir. 1991), cert. denied, 502 U.S. 1122 (1992); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 375-76 (7th Cir. 1985); *United States v. Postal*, 589 F.2d 862, 876-84 (5th Cir. 1979); see also Restatement (Third), *supra* note 15, § 111, cmt. h ("[T]he intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action."); John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 Am. J. Int'l L. 310, 329 (1992) ("It seems safe to conclude that the U.S. constitutional practice and status is that the treaty-making officials, as a unilateral matter, will control the determination of 'self-executing' in the domestic legal system.").

²⁴⁵ International law does not purport to regulate how nations implement international legal obligations within their domestic legal systems. See Louis Henkin et al., *International Law: Cases and Materials* 153 (3d ed. 1993).

²⁴⁶ Some commentators have criticized this approach as inconsistent with the Supremacy Clause, which they contend requires that treaties have certain domestic effects regardless of the wishes of the U.S. treaty-makers. See, e.g., Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 Chi.-Kent L. Rev. 571, 577 (1991); Vázquez, *supra* note 18, at 697-700. Although the Supremacy Clause clearly restricts the ability of the constituent states to determine the domestic effect of treaties, it is far from clear, as these commentators argue, that it similarly restricts the ability of the federal treaty-makers (which, after all, have the ability to prevent ratification of the treaty altogether). See Bradley, *supra* note 25, at 540 & n. 58.

²⁴⁷ See, e.g., Kevin C. Kennedy, *Treaty Interpretation by the Executive Branch: The ABM Treaty and "Star Wars" Testing and Development*, 80 Am. J. Int'l L. 854 (1986); David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. Pa. L. Rev. 1353 (1989). The last-in-time rule—that

tion, *Chevron* deference concerning the meaning of a treaty would be limited to situations where the executive branch entity has been charged with applying the treaty. More generally, *Chevron* deference is not absolute "political question" deference, something that the executive branch has sometimes pushed for in the treaty interpretation context.²⁴⁸

B. Customary International Law Interpretation

The conventional view is that deference to the executive branch concerning the meaning of customary international law is covered by essentially the same rule governing treaties: Courts are to give substantial weight to the executive branch's interpretation so that the United States generally will speak with one voice in foreign affairs.²⁴⁹ It is more difficult, however, to characterize deference with respect to customary international law as *Chevron* deference. Unlike for treaties, there is nothing that could be described as an act of delegation here. Customary international law is not made by an act of the President, or the President and Senate acting together; it is made instead by the overall beliefs and practices of the world community. Since there is no political branch action making customary international law part of United States law, it is not

later-in-time federal statutes supersede earlier treaties as a matter of U.S. law—also provides Congress with some (albeit not absolute) power to negate the consequences of Executive treaty interpretations with which it disagrees. See *supra* note 162 and accompanying text. Congress may also have substantial ability to respond to treaty interpretations through its control over appropriations.

²⁴³ A recent example is the executive branch's position in *Paraguay v. Allen*, 134 F.3d 622 (4th Cir.), cert. denied, 523 U.S. 371 (1998), in which Paraguay was arguing that Virginia had violated the Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(1), 21 U.S.T. 77, 596 U.N.T.S. 261. The executive branch submitted an *amicus curiae* brief in the Fourth Circuit arguing that treaty disputes such as this one should be considered nonjusticiable. See Brief for the United States as Amicus Curiae, *Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1988) (No. 96-2770). This argument, which the Fourth Circuit did not resolve, has been criticized by a number of commentators. See, e.g., Bederman, *supra* note 67, at 1466–68; Lori Fisler Damrosch, The Justiciability of Paraguay's Claim of Treaty Violation, 92 Am. J. Int'l L. 697, 697 (1998).

²⁴⁹ See Restatement (Third), *supra* note 15, § 112, cmt. c; see also Brief for the United States as Amicus Curiae at 15, *Domingues v. Nevada*, 120 S. Ct. 396 (1999) (mem.) (No. 98-8327) (arguing that "the courts should defer to the position of the Executive Branch as to whether a rule of customary international law is presently binding on the United States in its relations with other Nations, just as they give weight to the Executive Branch's interpretation of a treaty").

clear where the executive branch's interpretive lawmaking power is coming from. Many commentators claim that customary international law has the status in the United States of judge-made federal common law. If so, it would seem peculiar to conclude that the judiciary has delegated interpretive authority over this law to a coordinate branch. After all, most commentators agree that federal common law is justified only when the courts themselves have been delegated the lawmaking power;²⁵⁰ if the Constitution or Congress has delegated the customary international law power to the courts, what basis do they have for shifting it over to the executive branch?²⁵¹

The answer to this problem rests, I would argue, with recognizing that customary international law is not inherently part of United States federal law, whether common law or otherwise. As noted above, this conclusion is supported by, among other things, the Supremacy Clause's reference to treaties but not customary international law.²⁵² Understood this way, executive branch interpretations are not exercises of domestic legislative power, and, as a result, there is no need to find a *Chevron*-like delegation. Once removed from this constraint, there are good policy reasons for judicial deference to the executive branch. Customary international law is very fluid and amorphous, making the executive branch's expertise and access to information especially important.²⁵³ In addition, the formation and evolution of customary international law can be influenced by executive branch statements and actions. Indeed, the ability of the United States to influence a change in

²⁵⁰ See *supra* note 83.

²⁵¹ It might be argued that if customary international law has the status of federal law, the obligation of the President in Article II of the Constitution to "take Care that the Laws be faithfully executed" provides a basis for presuming a *Chevron*-like delegation of authority to the Executive. This argument, however, would justify deference to the Executive concerning the meaning of *all* federal law, since the Take Care Clause makes no distinction between the purported federal law of customary international law and other federal law. Moreover, even if it has the status of federal law today, customary international law did not have that status when Article II was ratified—in other words, at the time the delegation would have been made. See Bradley & Goldsmith, *supra* note 32, at 822–26; see also citations *supra* note 198.

²⁵² See *supra* note 34 and accompanying text.

²⁵³ See Phillip R. Trimble, A Revisionist View of Customary International Law, 33 UCLA L. Rev. 665, 713–16 (1986).

customary international law may depend on executive branch flexibility in interpreting the requirements of this law.²⁵⁴

Customary international law may come into the United States legal system, of course, if brought in by the political branches. Congress sometimes codifies what it believes to be the requirements of international law.²⁵⁵ In addition, Congress sometimes makes general references in its statutes to customary international law.²⁵⁶ It also is possible that the executive branch has some independent power to incorporate customary international law into United States law. If so, it would naturally make sense for courts to defer to the executive branch's construction of this incorporated law; indeed, since the executive branch is the original lawmaker in that setting, courts might in some situations give *absolute* deference to the executive branch's interpretation.²⁵⁷

This analysis is supported by the way in which courts have treated foreign sovereign immunity and head-of-state immunity. Foreign nations and their leaders have long been accorded immunity from suit in United States courts. During the nineteenth and early twentieth centuries, the courts treated this immunity as a common law doctrine derived in part from principles of customary international law.²⁵⁸ Because of the international law basis for this

²⁵⁴ See *id.* at 709–13; see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432–33 (1964) (“When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.”).

²⁵⁵ See, e.g., 22 U.S.C. § 2370(e)(1) (1994) (First Hickenlooper Amendment) (specifying international law requirements relating to takings of property).

²⁵⁶ See, e.g., 18 U.S.C. § 1651 (1994) (criminalizing piracy on the high seas “as defined by the law of nations”); 28 U.S.C. § 1350 (1994) (conferring jurisdiction on federal district courts over “any civil action by an alien for a tort only, committed in violation of the law of nations”); 28 U.S.C. § 1605(a)(3) (1994) (denying immunity to foreign state defendants in certain actions “in which rights in property taken in violation of international law are in issue”).

²⁵⁷ This situation is somewhat analogous to agency interpretations of their own regulations, to which courts give substantial deference. See, e.g., *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945); cf. Manning, *supra* note 85, at 617 (arguing for an independent judicial check on agency interpretations of agency rules).

²⁵⁸ See, e.g., *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). Although the U.S. Attorney argued for immunity in *The Schooner Exchange*, the Court did not appear to believe itself bound by that argument.

immunity, courts commonly accorded some (but not absolute) deference to the views of the executive branch.²⁵⁹ And they deferred absolutely to the views of the executive branch concerning certain "international facts," such as the proper representative of a foreign state.²⁶⁰ But courts made the ultimate determination of whether a defendant was entitled to immunity, and on occasion the courts rejected the executive branch's views.²⁶¹

Starting in the late 1930s, the Supreme Court began reconceptualizing the legal basis for foreign sovereign immunity.²⁶² Instead of basing this immunity primarily in customary international law, the Court began basing it, in effect, on law made by the executive branch. As a result, the Court soon began giving absolute deference to the executive branch's views regarding immunity, even when those views were contrary to customary international law.²⁶³ In *Ex Parte Peru*,²⁶⁴ the Court said that it would treat Executive suggestions of immunity as a "conclusive determination" of the is-

²⁵⁹ See generally G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1, 136 (1999) (explaining that "Executive 'suggestions' about foreign sovereign immunity were entitled to weight but did not bind the courts").

²⁶⁰ *Id.* at 27.

²⁶¹ See, e.g., *Berizzi Bros. v. S.S. Pesaro*, 271 U.S. 562, 574 (1926) (granting immunity even though the State Department had argued in the lower court that immunity not be granted); *Voievodine v. Government of the Commander-in-Chief of Armed Forces in S. of Russ.*, 249 N.Y.S. 644, 647 (N.Y. App. Div. 1931) (stating that the revolutionary government in Russia would have immunity from suit "irrespective of whether or not such government were recognized by the government of the United States"); see also Henkin, *supra* note 22, at 55 ("[W]hile these [executive suggestions] were accorded 'great weight,' the courts decided the question of immunity on the basis of their own conclusions as to what international law required.").

²⁶² In 1938, the Supreme Court suggested for the first time that executive branch suggestions of immunity were binding on the courts. See *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938); see generally White, *supra* note 259, at 134-45 (discussing the shift in deference given to the executive branch on immunity issues).

²⁶³ See Henkin, *supra* note 22, at 351 n.68 ("[The Court] was apparently giving effect not to Executive views of international law but to 'national policy' on immunity even if it was contrary to, or not based on or related to, international law."). There are a number of likely reasons for this reconception. One such reason is that federal court common lawmaking became more problematic after *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). See generally Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 Mich. L. Rev. 2129, 2161-65 (1999) (explaining this point).

²⁶⁴ 318 U.S. 578 (1943).

sue,²⁶⁵ and in *Mexico v. Hoffman*,²⁶⁶ the Court said that it was “not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.”²⁶⁷ Whether or not the Court was right to recognize such an independent lawmaking power is beyond the scope of this Article. But having done so, it was understandable that the Court would defer to the executive branch regarding the application of that law. A number of commentators who at the time criticized this absolute deference as an abdication of judicial duty failed to appreciate this source-of-law point.²⁶⁸ Their argument was that foreign sovereign immunity is ultimately a “legal” question and that “therefore” the courts rather than the executive branch should have the final word. That would not necessarily be true, however, if the executive branch is itself the source of the law and is, in effect, making the law to govern the particular case.

The executive branch’s lawmaking role was made even clearer in 1952, when the State Department issued the Tate Letter.²⁶⁹ This Letter, officially entitled “Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments,” formally adopted the “restrictive” approach to immunity, pursuant to which foreign states would be denied immunity for their private or commercial acts.²⁷⁰ Given decisions like *Peru* and *Hoffman*, the State Department was quite modest in describing the expected effect of the Tate Letter, stating, “[i]t is realized that a shift in policy by the executive cannot control the courts, but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so.”²⁷¹ The Department did note, however,

²⁶⁵ Id. at 589.

²⁶⁶ 324 U.S. 30 (1945).

²⁶⁷ Id. at 35.

²⁶⁸ See, e.g., Edwin D. Dickinson, The Law of Nations as National Law: “Political Questions,” 104 U. Pa. L. Rev. 451, 477–79 (1956); Philip C. Jessup, Has the Supreme Court Abdicated One of its Functions?, 40 Am. J. Int’l L. 168 (1946); John Norton Moore, The Role of the State Department in Judicial Proceedings, 31 Fordham L. Rev. 277, 279 (1962).

²⁶⁹ Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments, 26 Dep’t St. Bull. 982 (1952).

²⁷⁰ Id. at 982–85.

²⁷¹ Id.

that "[t]here have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations."²⁷² After the promulgation of the Tate Letter, the State Department continued to make suggestions of immunity, and courts continued to give absolute deference to those suggestions. In cases where the State Department did not express its views, courts generally attempted to decide the immunity issue consistent with State Department practice.²⁷³

To understand this regime as judicial deference to executive branch lawmaking is not to defend it. The case-by-case executive branch lawmaking was in fact problematic for several reasons. First, the State Department was acting in effect as a court, and yet it lacked many of the procedural protections typically associated with adjudication. Although it did eventually establish informal hearing procedures, it did not, for example, allow for cross-examination, publish the reasoning of its decisions, or provide for appellate review.²⁷⁴ Second, the State Department's determinations of immunity were, perhaps understandably, influenced by political considerations. This meant that the determinations were rather inconsistent and unpredictable.²⁷⁵ Yet foreign sovereign immunity, given its jurisdictional and international business implications, is an

²⁷² *Id.*

²⁷³ See, e.g., *Victory Transp. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 359–60 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965); see also *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 487 (1983) (noting that when the foreign state did not seek a suggestion from the State Department, "responsibility fell to the courts to determine whether sovereign immunity existed, generally by reference to prior State Department decisions"); Andreas F. Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. Rev. 901, 909–11 (1969) (describing the approach of courts in this period to immunity issues).

²⁷⁴ See Monroe Leigh, *Sovereign Immunity—The Case of the "Imias,"* 68 Am. J. Int'l L. 280, 281–82 (1974); Andreas F. Lowenfeld, *Litigating a Sovereign Immunity Claim—The Haiti Case*, 49 N.Y.U. L. Rev. 377, 391–92 (1974).

²⁷⁵ See, e.g., *Rich v. Naviera Vacuba, S.A.*, 197 F. Supp. 710, 724 (E.D. Va. 1961) (deferring to State Department suggestion of immunity even though it was inconsistent with the restrictive theory of immunity endorsed in the Tate Letter), aff'd, 295 F.2d 24 (4th Cir. 1961) (per curiam); *Chemical Natural Resources v. Venezuela*, 215 A.2d 864, 869–70 (Pa. 1966); see also Leigh, *supra* note 274, at 280–89 (discussing another case in which the State Department suggestion of immunity appeared to be inconsistent with the Tate Letter).

issue for which more rule-like certainty would seem to be especially desirable. Finally, this regime, ironically, often had the effect of undermining United States foreign relations. The inherently political nature of the immunity determinations meant that a denial of immunity tended to generate more foreign relations friction than if the issue had been left solely to judicial determination.²⁷⁶

Because of these deficiencies, Congress eventually enacted a comprehensive statute governing foreign sovereign immunity—the 1976 Foreign Sovereign Immunities Act (“FSIA”).²⁷⁷ As the House and Senate Reports accompanying this legislation explain, a “principal purpose” of the statute was “to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.”²⁷⁸ Although this statement mentions a transfer of authority to the courts, the Act also was obviously a transfer of authority to *Congress*; instead of a common law regime, the Act establishes a detailed statutory framework binding on the courts. The Act thus shifts lawmaking in this area to Congress and the courts jointly and away from the executive branch. Because the executive branch was not charged with administering the statute, *Chevron* deference does not appear warranted.²⁷⁹ And, indeed,

²⁷⁶ See Frederic Alan Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 *Yale Stud. in World Pub. Ord.*, 1, 40–41 (1976).

²⁷⁷ 28 U.S.C. §§ 1330, 1602–11 (1994).

²⁷⁸ See H.R. Rep. No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604; S. Rep. No. 94-1310, at 9 (1976).

²⁷⁹ See Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 *Colum. J. Transnat’l L.* 33, 65 (1978) (“[The FSIA] turned the old law on its head; no longer was it the ‘duty’ of the courts to follow the executive but henceforth the executive was to be bound by the findings of the judiciary.”); Weber, *supra* note 276, at 13 (“Presumably, then, under the [FSIA] the State Department will no longer make suggestions of immunity to the courts, or, if it does, the courts will ignore them under usual circumstances.”). The State Department announced when the FSIA was enacted that it expected to “play the same role in sovereign immunity cases that it does in other types of litigation—for example, appearing as *amicus curiae* in cases of significant interest to the Government.” Letter from the Legal Adviser of the State Department to the Attorney General, 75 *Dep’t St. Bull.* 649, 649 (1976).

courts have not felt bound to defer to the executive branch's views regarding the meaning of the FSIA.²⁸⁰

The FSIA does not expressly cover suits against foreign heads of state.²⁸¹ As a result, "head-of-state immunity" continues to be treated the way that foreign sovereign immunity was treated prior to the enactment of the FSIA. That is, courts defer absolutely to the views of the executive branch because this immunity law is considered, in effect, a form of executive branch lawmaking.²⁸² Although head-of-state immunity arises less frequently than foreign sovereign immunity, the case-by-case executive branch lawmaking may present some of the same concerns associated with the pre-FSIA regime. One concern is that the precise scope of this immunity is far from clear.²⁸³

A number of commentators have suggested that Congress codify head-of-state immunity. The most obvious option would be for Congress simply to include this immunity within the framework of

²⁸⁰ See, e.g., *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990) (rejecting the State Department's suggested interpretation of the FSIA). In other cases in which courts have accepted the executive branch's views concerning the meaning of the FSIA, they appear to be giving those views no more than persuasiveness deference. See, e.g., *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994), cert. denied, 513 U.S. 1150 (1995). In 1996 amendments to the FSIA, however, Congress delegated authority over one issue to the executive branch: These amendments remove immunity with respect to certain conduct by "state sponsors of terrorism," and they leave to the executive branch the determination of which nations are properly labeled state sponsors of terrorism. See 28 U.S.C. § 1605(a)(7)(A) (1994 & 1999 Supp.). Moreover, as discussed above, recent amendments relating to attachment and execution of property raise a scope-of-authority issue that may warrant *Chevron* deference. See *supra* note 255.

²⁸¹ By contrast, the British sovereign immunity statute specifically provides for head-of-state immunity. See State Immunity Act, 1978, ch. 33 (Eng.), §14(1)(a), reprinted in 17 I.L.M. 1123. The House of Lords recently applied these head-of-state immunity provisions in the *Pinochet* case. See Bradley & Goldsmith, *supra* note 263, at 2135-39.

²⁸² See, e.g., *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997), cert. denied, 523 U.S. 1060 (1998); *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1119 (D.D.C. 1996); *Junquist v. Nahyan*, 940 F. Supp. 312, 321 (D.D.C. 1996); *Lafontant v. Aristide*, 844 F. Supp. 128, 137 (E.D.N.Y. 1994).

²⁸³ See, e.g., *Doe v. United States*, 860 F.2d 40, 44 (2d Cir. 1988) ("The scope of this immunity is in an amorphous and undeveloped state."); Joseph W. Dellapenna, Case Note, Head-of-State Immunity—Foreign Sovereign Immunities Act—Suggestion by the Department of State, 88 Am. J. Int'l L. 528, 531 (1994) (describing head of state immunity as "an at best amorphous legal doctrine whose very existence is not entirely settled in U.S. law and whose reach is almost completely uncertain").

the FSIA, and commentators have in fact suggested that.²⁸⁴ But Congress would not necessarily need to transfer this issue completely away from the executive branch to eliminate some of the problems associated with the suggestion-of-immunity procedure.²⁸⁵ Indeed, one disadvantage of doing so is that it might make it harder for the United States government to respond to changes in international law or politics, something that may be more important with respect to interactions with individual heads of state than it is with respect to interactions with foreign nations in general. An alternative approach would be for Congress to draft a statutory framework and delegate to the executive branch the responsibility of promulgating interpretive regulations.²⁸⁶ If Congress did so, *Chevron* deference presumably would be appropriate.

V. FEDERAL COMMON LAW OF FOREIGN RELATIONS

It is conventional wisdom that courts may address some foreign affairs issues through the development of post-*Erie* federal common law.²⁸⁷ In this Part, I consider the relationship between *Chevron*

²⁸⁴ See, e.g., Dellapenna, *supra* note 283, at 532; Shobha Varughese George, Note, Head-of-State Immunity in the United States Courts: Still Confused After All These Years, 64 Fordham L. Rev. 1051, 1076–86 (1995); Jerrold L. Mallory, Note, Resolving the Confusion over Head of State Immunity: The Defined Right of Kings, 86 Colum. L. Rev. 169, 187–97 (1986).

²⁸⁵ See *supra* text accompanying notes 274–276.

²⁸⁶ For suggestions along these lines, see Jack L. Goldsmith, Federal Courts, Foreign Affairs, and Federalism, 83 Va. L. Rev. 1617, 1710 (1997); Peter Evan Bass, Note, Ex-Head of State Immunity: A Proposed Statutory Tool of Foreign Policy, 97 Yale L.J. 299, 312–15 (1987). Congress has followed this approach to some extent with respect to the immunity of international organizations: The International Organizations Immunities Act expressly delegates to the executive branch the role of designating which organizations shall be entitled to immunity and the ability to modify or withdraw such immunity. See 22 U.S.C. §§ 288–288j (1994). Given Congress's delegation of this authority to the executive branch, it may well be appropriate to give *Chevron* deference to the executive branch's interpretations of this statute. And, indeed, at least one court has expressly so held. See *Taiwan v. United States Dist. Ct.*, 128 F.3d 712, 718–19 (9th Cir. 1997); see also *Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1341 (D.C. Cir. 1998) (“It seems, therefore, that Congress was content [in the International Organizations Immunities Act] to delegate to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances.”).

²⁸⁷ See, e.g., Erwin Chemerinsky, Federal Jurisdiction 369–70 (3d ed. 1999); Martin H. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 135–36 (2d ed. 1990).

deference and aspects of the federal common law of foreign relations, in particular the act of state doctrine and the dormant foreign affairs preemption doctrine.²⁸⁸ I conclude that *Chevron* deference is inappropriate in this context because there is no basis for presuming a delegation of lawmaking power to the executive branch, and (unlike head-of-state immunity, for example) these doctrines are not based on the executive branch's independent lawmaking powers. This examination also shows that, as the Supreme Court has moved away from a standards-based approach to these federal common law doctrines, it has reduced the justifications for other types of deference as well.²⁸⁹

A. Act of State Doctrine

Pursuant to the act of state doctrine, United States courts generally decline to pass judgment on the validity of acts of foreign governments taken within their own territory.²⁹⁰ Traditionally, courts linked the act of state doctrine closely with customary international law principles of sovereign immunity.²⁹¹ After *Erie*, however,

²⁸⁸ These doctrines are both properly considered forms of federal common law because they are judge-made, preempt conflicting state law, and can be overridden by Congress. See Goldsmith, *supra* note 286, at 1630–31. Some commentators argue that customary international law also has the status in the United States of federal common law. Judicial deference to the executive branch concerning customary international law is discussed above. See *supra* Part IV.B.

²⁸⁹ This shift in recent years from a standards-oriented approach to a rules-oriented approach is evident in a number of areas of foreign affairs law. See Goldsmith, *supra* note 185, at 1424–29. A general effect of this shift has been to reduce the likelihood of judicial deference to the executive branch in those areas because the basis for *factual* deference is reduced and the courts do not perceive a basis for *legal* deference. It is no coincidence that the executive branch typically argues in these cases for a case-by-case approach; that is the approach most likely to result in deference to the executive branch.

²⁹⁰ See *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (“[T]he courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”).

²⁹¹ See *Underhill*, 168 U.S. at 252; *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812); *Hatch v. Baez*, 14 N.Y. Sup. Ct. 596, 598–99 (1876); see also *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972) (plurality opinion) (noting that “[t]he separate lines of cases enunciating both the act of state and sovereign immunity doctrines have a common source in [*The Schooner Exchange*]”); Michael J. Bazzyler, *Abolishing the Act of State Doctrine*, 134 U. Pa. L. Rev. 325, 331 (1986) (“Act of state immunity therefore arose as nothing more than a corollary to sovereign immunity.”).

some courts began treating the act of state doctrine the way that they had begun treating foreign sovereign immunity—as emanating from executive branch lawmaking, not international law.²⁹² The most famous example of this approach is the *Bernstein* litigation in the Second Circuit. In its first decision in this case, the court applied the act of state doctrine to bar consideration of claims against Germany concerning confiscation of property by Nazi officials, noting that the executive branch was “the authority to which we must look for the final word in such matters” and that the executive branch had not given any indication of a “positive intent to relax the doctrine.”²⁹³ Subsequently, the State Department wrote a letter declaring the “policy of the Executive . . . to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.”²⁹⁴ The Second Circuit then changed its decision to allow adjudication of the claims,²⁹⁵ explaining that it was taking account of “this supervening expression of Executive Policy.”²⁹⁶

In its 1964 *Sabbatino* decision,²⁹⁷ the Supreme Court reconceptualized the act of state doctrine, just as it had reconceptualized foreign sovereign immunity during the 1940s. The Court rejected the notion that the doctrine was derived from customary international law,²⁹⁸ and it seemed also to imply that the doctrine was not derived from the executive branch’s lawmaking powers.²⁹⁹ Instead, the Court said that the doctrine “arises out of the basic relationships between branches of government in a system of separation of

²⁹² See *supra* text accompanying notes 262–273.

²⁹³ *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246, 249–51 (2d Cir.), cert. denied, 332 U.S. 772 (1947).

²⁹⁴ *Jurisdiction of U.S. Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers*, 20 Dep’t St. Bull. 592, 593 (1949).

²⁹⁵ See *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 375–76 (2d Cir. 1954).

²⁹⁶ *Id.* at 376. See also *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 858 (2d Cir. 1962) (relying on a letter from the State Department), rev’d, 376 U.S. 398 (1964).

²⁹⁷ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

²⁹⁸ See *id.* at 421 (stating that “international law does not require application of the doctrine”).

²⁹⁹ See *id.* at 422–23 (suggesting that the act of state doctrine applies regardless of the particular position of the executive branch regarding the case). See also Henkin, *supra* note 22, at 139 (“The Court claimed no authorization from Congress to elaborate the Act of State doctrine, and seemed carefully to avoid seeking support for it in Executive authority . . .”).

powers.”³⁰⁰ The implications of this separation-of-powers conception of the act of state doctrine for judicial deference to the executive branch were not immediately clear. After *Sabbatino*, deference could no longer be justified by virtue of the executive branch’s role vis-à-vis customary international law, or by its ability to control the law it was making. Moreover, deference to the executive branch could not be justified on *Chevron* grounds: Since the doctrine was now conceived of as a judge-made rule derived from “constitutional underpinnings,”³⁰¹ there was no basis for presuming a delegation of lawmaking authority to the executive branch. But if the legal test for the act of state doctrine (as determined by the courts) required assessment of the likely effect of an adjudication on either United States foreign relations or the executive branch’s prerogatives, it might well make sense to defer to the executive branch on that predictive question.³⁰² As the *Restatement (Third) of Foreign Relations* explains, “[t]he argument in favor of deferring to the Executive Branch is that only that branch is in a position to judge the effect of judicial examination of a foreign act on the conduct of foreign relations or on relations with a particular state.”³⁰³ *Sabbatino* did not itself resolve this issue; the Court was unclear regarding the precise test for the act of state doctrine, and it reserved judgment on the validity of a *Bernstein*-type exception.³⁰⁴

For a number of years after *Sabbatino*, the lower courts struggled with this issue. Eventually, in *First National City Bank v.*

³⁰⁰ *Sabbatino*, 376 U.S. at 423. The specific holding of *Sabbatino*—that the act of state doctrine barred judicial consideration of the validity of foreign government takings of property presently before the court—was subsequently overturned by Congress in the Second Hickenlooper Amendment. See Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1009 (1964) (codified as amended in 22 U.S.C. § 2370(e)(2) (1994)). This Amendment also allowed the President to reinstate the effect of the act of state doctrine “in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.” 22 U.S.C. § 2370 (e)(2).

³⁰¹ *Sabbatino*, 376 U.S. at 423.

³⁰² In other contexts, even involving the application of constitutional provisions, the Supreme Court has deferred to the executive branch’s views regarding international facts. See *supra* Part I.B.

³⁰³ *Restatement (Third)*, *supra* note 15, § 443 cmt. h.

³⁰⁴ See *Sabbatino*, 376 U.S. at 420.

Banco Nacional de Cuba,³⁰⁵ six Supreme Court Justices—four in dissent³⁰⁶ and two in concurrences,³⁰⁷—rejected a *Bernstein* exception to the act of state doctrine. These Justices reasoned, in effect, that the act of state doctrine was a rule concerning judicial competence (the four dissenters described it as a “political question”), and that it would, as a result, be inconsistent with separation of powers and the “rule of law” to allow the Executive to control the application of the doctrine. This decision put an end to complete judicial deference to *Bernstein* letters. Nevertheless, because the test for the act of state doctrine remained uncertain, some courts continued to give some weight to *Bernstein* letters. They did so on the theory that the act of state doctrine was designed, at least in part, to avoid interference with the executive branch’s conduct of foreign relations, and that a *Bernstein* letter was relevant factual evidence concerning that point. As one court explained, “the [State] Department’s legal conclusions as to the reach of the act of state doctrine are not controlling on the courts. But the Department’s factual assessment of whether fulfillment of its responsibilities will be prejudiced by the course of civil litigation is entitled to substantial respect.”³⁰⁸

Recently, the Supreme Court moved to an even more rule-like conception of the act of state doctrine and, thereby, further reduced the grounds for judicial deference to the executive branch when applying the doctrine. In *W.S. Kirkpatrick & Co. v. Envi-*

³⁰⁵ 406 U.S. 759 (1972).

³⁰⁶ See *id.* at 776 (Brennan, J., dissenting).

³⁰⁷ See *id.* at 772–73 (Douglas, J., concurring) (stating that the *Bernstein* exception would make the Court “a mere errand boy for the Executive Branch which may choose to pick some people’s chestnuts from the fire, but not other’s”); *id.* at 773 (Powell, J., concurring) (stating that the reasoning of *Sabbatino* implicitly rejected a *Bernstein* exception, and that he “would be uncomfortable with a doctrine which would require the judiciary to receive the Executive’s permission before invoking its jurisdiction”).

³⁰⁸ *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1062 (3d Cir. 1988), *aff’d* on other grounds, 493 U.S. 400 (1990); see also, e.g., *Kalamazoo Spice Extraction Co. v. Provisional Military Gov’t of Socialist Ethiopia*, 729 F.2d 422, 427–28 (6th Cir. 1984). In *Kalamazoo Spice*, the court also relied heavily on the fact that the foreign state defendant was alleged to have violated a self-executing treaty, as opposed to, in *Sabbatino*, customary international law. See *Kalamazoo Spice*, 729 F.2d at 427–28. Once again, this appears to confirm that customary international law does not have the same status in U.S. courts as a self-executing treaty.

ronmental Tectonics Corp.,³⁰⁹ the Court rejected the notion that it should apply the act of state doctrine based on a case-by-case assessment of whether the underlying policies of the doctrine were implicated. In that case, one company was alleging that another company had violated federal law by bribing officials of the Nigerian government. The defendant company argued that the act of state doctrine should bar the suit because the facts necessary to establish the plaintiff's claim would also establish unlawful conduct by the Nigerian government (acceptance of a bribe) and would thereby embarrass that government and interfere with United States foreign relations. While the executive branch did not oppose adjudication of this issue, it did argue in an *amicus curiae* brief that the Court should follow a case-by-case approach to the act of state doctrine and should resolve the case on the ground that the State Department did not oppose adjudication.³¹⁰ In rejecting both the defendant's argument and the executive branch's suggested approach, the Court (through Justice Scalia) explained, "[t]he act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid."³¹¹ As a result, the doctrine applies, said the Court, "only . . . when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign."³¹²

Thus, the Court's shift to a separation-of-powers conception of the act of state doctrine, combined with its adoption of a rule-like approach to the doctrine, has entailed a corresponding shift away from deference to the executive branch. Deference can no longer be justified by the executive branch's authority or expertise concerning international law, the executive branch's independent lawmaking powers, or even (in many cases) the executive branch's superior ability to assess international facts. Once again, this sug-

³⁰⁹ 493 U.S. 400 (1990).

³¹⁰ See *id.* at 408.

³¹¹ *Id.* at 409. The Court left open the possibility that a case-by-case approach could be used to *narrow* the application of the act of state doctrine, see *id.*, so courts may find that some deference to the executive branch continues to be appropriate with respect to that issue. See, e.g., *National Coalition Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 354 (C.D. Cal. 1997).

³¹² *Kirkpatrick*, 493 U.S. at 406 (emphasis in original).

gests that deference in foreign affairs cases properly depends on the source and nature of the law in question.

B. Dormant Preemption

Another federal common law doctrine concerning foreign affairs is “dormant foreign affairs preemption.” Under this doctrine, if states become too involved in foreign affairs matters, their actions will be implicitly preempted by the Constitution’s assignment of foreign affairs powers to the federal government.³¹³ Although this doctrine has been vigorously criticized by some commentators,³¹⁴ it is still applied from time to time by the lower courts. For example, the First Circuit recently relied on this doctrine to invalidate a Burma sanctions law enacted by the Commonwealth of Massachusetts.³¹⁵ The Supreme Court is currently reviewing the First Circuit’s decision, so it is possible that the Court will soon provide additional guidance concerning the validity and scope of the dormant foreign affairs preemption doctrine.

The dormant foreign affairs preemption doctrine had its genesis in a 1968 decision, *Zschernig v. Miller*.³¹⁶ There, an Oregon statute in effect disallowed alien residents of Communist countries from inheriting the property of Oregon residents. The Supreme Court held, in an opinion by Justice Douglas, that the statute was preempted as “an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.”³¹⁷ Importantly, the Court reached this conclusion even though the executive branch had submitted a brief stating that it

³¹³ Another variant of this doctrine is the proposition, endorsed by a few courts, that a state-law case will fall within the “arising under” jurisdiction of the federal courts if it substantially implicates foreign relations. See, e.g., *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997); *Philippines v. Marcos*, 806 F.2d 344, 352–53 (2d Cir. 1986).

³¹⁴ See, e.g., Goldsmith, *supra* note 286.

³¹⁵ See *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 77 (1st Cir.), cert. granted, 120 S.Ct. 525 (1999).

³¹⁶ 389 U.S. 429 (1968). See also Henkin, *supra* note 22, at 163 (describing *Zschernig* as “new constitutional doctrine”); Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 Am. J. Int’l L. 821, 825 (“*Zschernig* is a unique case—the only one in which the Supreme Court has clearly stated such a doctrine of a ‘dormant’ foreign relations power.”).

³¹⁷ *Zschernig*, 389 U.S. at 432.

did *not* believe that the statute would unduly interfere with foreign relations.³¹⁸

The *Chevron* framework suggests that the Court was right in *Zschernig* not to defer to the executive branch concerning the *legal test* for dormant foreign affairs preemption. Such preemption stems from constitutional structure, and there is little formal or functional justification for presuming that the interpretation of this structure has been delegated to the executive branch. As Justices Stewart and Brennan noted in a concurrence, that issue concerns “the basic allocation of power between the States and the Nation” and thus should “not vary from day to day with the shifting winds at the State Department.”³¹⁹ But that is not really what was at stake. The Court’s legal test for dormant foreign affairs preemption appeared to rest on the degree of effect that the particular state law was likely to have on foreign relations, and the executive branch did not take issue with that test.³²⁰ Rather, the executive branch merely argued that, as a factual matter, the particular state law in question was not likely to interfere with foreign relations. Given the greater expertise and information of the executive branch concerning this point, it seems odd for the Court not to have deferred. As Justice Harlan pointed out in his concurrence, the majority’s conclusion regarding likely effect on foreign relations was “based almost entirely on speculation” and flatly contradicted the views and experiences of both the Justice Department and the State Department.³²¹ As noted above, in other contexts the Court has deferred to the executive branch’s assessment of international facts.³²² Perhaps not surprisingly, therefore, some lower courts, when applying the *Zschernig* doctrine, have given deference to the views of the executive branch.³²³

³¹⁸ See *id.* at 434.

³¹⁹ *Id.* at 443 (Stewart, J., concurring).

³²⁰ See *id.* at 434–35, 440.

³²¹ *Id.* at 457–60 (Harlan, J., concurring). Justice White issued a brief dissent, stating that “[g]enerally for the reasons stated by [Justice Harlan],” he also did not believe that the state law should be subject to dormant preemption. *Id.* at 462 (White, J., dissenting).

³²² See *supra* Part I.B.

³²³ See, e.g., *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1376–80 (D.N.M. 1980). A somewhat related issue is whether, in applying the federal common law of foreign relations, courts should defer to the views of *foreign governments* concerning

To say that the courts should defer to the executive branch in making ad hoc assessments of a likely impact on foreign relations is not to say that this is a good test for preemption. As discussed above in connection with the pre-FSLA regime for determining foreign sovereign immunity, case-by-case executive branch control provides less notice and predictability than might be desirable. The Supreme Court has not had occasion to reexamine the dormant foreign relations preemption doctrine since *Zschernig*, although, as noted above, it may do so this Term.³²⁴ Assuming the Court retains the doctrine, it is possible that it will move away from the fact-bound test it used in *Zschernig*. That is what the Court has done with respect to a similar doctrine, “dormant foreign commerce clause preemption.”³²⁵

For a number of years, the Court considered the likely effect of state taxation measures on the ability of the United States to “speak with one voice” in foreign commerce when determining whether these measures were preempted by the foreign commerce clause.³²⁶ In applying this “one voice” test, the Court not surprisingly looked to the views of the executive branch.³²⁷ This prompted a concurrence by Justice Scalia in one of the cases (*Itel Containers*), in which he criticized the Court for essentially tying the constitutionality of state law to the position of the executive branch.³²⁸

This all changed in the Court’s 1994 *Barclays Bank* decision.³²⁹ There, the Court upheld the constitutionality of California’s “combined worldwide reporting” method of taxing multinational corporations. It did so notwithstanding substantial foreign protest concerning the tax, stating that the “argument that California’s

the likely impact of a state’s action on foreign relations. Foreign governments are increasingly making their views known in international litigation through, for example, the filing of *amicus curiae* briefs.

³²⁴ See *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir.), cert. granted, 120 S. Ct. 525 (1999).

³²⁵ The Constitution grants Congress the power to regulate “Commerce with foreign Nations.” U.S. Const. art. I, § 8, cl. 3. Like its domestic counterpart, this grant of power has been construed to have a “dormant” or “negative” component that automatically preempts conflicting state laws.

³²⁶ E.g., *Japan Line v. County of Los Angeles*, 441 U.S. 434, 448–51 (1979).

³²⁷ See, e.g., *Itel Containers Int’l Corp. v. Huddleston*, 507 U.S. 60, 75–76 (1993); *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 195–96 (1983).

³²⁸ See *Itel*, 507 U.S. at 81 (Scalia, J., concurring).

³²⁹ *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994). This decision was foreshadowed in *Wardair Canada v. Florida Dep’t of Revenue*, 477 U.S. 1 (1986).

worldwide combined reporting requirement is unconstitutional because it is likely to provoke retaliatory action by foreign governments is directed at the wrong forum.”³³⁰ The Court said that preemption on the “one voice” ground was a decision for Congress, not the courts: “[W]e leave it to Congress—whose voice, in this area, is the Nation’s—to evaluate whether the national interest is best served by tax uniformity, or state autonomy.”³³¹

The Court in *Barclays Bank* thus moved away from a “one voice” test for dormant foreign commerce clause preemption.³³² As a result, the Court found that it no longer made sense to defer to the executive branch in determining whether a state law was preempted. In its *amicus curiae* brief to the Court, the executive branch did not argue that the California tax should be preempted. It did argue more generally, however, that the Court should give “substantial evidentiary weight” to the positions of the executive branch in determining whether a state law is subject to dormant foreign commerce clause preemption.³³³ The Court rejected this proposition, stating, “Executive branch communications that express federal policy but lack the force of law cannot render unconstitutional California’s otherwise valid, congressionally condoned, use of worldwide combined reporting.”³³⁴ As Justice Scalia pointed out in a concurrence, the Court in *Barclays Bank* was abandoning the idea that the executive branch had the power to decide whether a state law was preempted under the dormant foreign commerce clause doctrine.³³⁵ Even Justices O’Connor and Thomas in their partial dissent agreed that this issue should be decided by objective factors, “not statements made and briefs filed by officials in the Executive Branch.”³³⁶ This conclusion appears to be

³³⁰ *Barclays Bank*, 512 U.S. at 327–28.

³³¹ *Id.* at 331.

³³² See Goldsmith, *supra* note 286, at 1705; Peter J. Spiro, The States and Immigration in an Era of Demi-Sovereignities, 35 Va. J. Int’l L. 121, 164 (1994); Charles Tiefer, Free Trade Agreements and the New Federalism, 7 Minn. J. Global Trade 45, 53 (1998).

³³³ Brief for the United States as Amicus Curiae Supporting Respondent at 19, *Barclays Bank* (Nos. 92-1384 & 92-1839).

³³⁴ *Barclays Bank*, 512 U.S. at 330.

³³⁵ See *id.* at 332.

³³⁶ *Id.* at 334. Given these statements, it is difficult to understand the basis for Professor Koh’s recent assertion that the *Barclays Bank* decision reflects “the Court’s

sound. After all, there was no basis for presuming a *Chevron*-like delegation, the law was not perceived as emanating from the executive branch's independent lawmaking powers, and the legal test no longer required an assessment of international facts.³³⁷

In sum, the Supreme Court has moved towards a more rule-like conception of these areas of federal common law and, in the process, has moved away from strong deference to the executive branch. It has done so because of understandable concerns regarding ad hoc Executive control of pending cases—the same concerns that led Congress to codify foreign sovereign immunity. Importantly, although such ad hoc control often is a byproduct of Executive lawmaking deference and international facts deference, it is not something that follows from application of the *Chevron* doctrine. The type of deference matters.

CONCLUSION

There are a number of ways in which the *Chevron* doctrine has direct relevance to foreign affairs law. The *Chevron* doctrine will apply by its own terms to some interpretations of foreign affairs statutes by administrative agencies. It also is likely to apply to situations in which Congress has delegated foreign affairs authority more generally to the President. Courts may also extend the *Chevron* doctrine by analogy to help explain the deference that has long been given to executive branch interpretations of treaties. In these and other foreign affairs contexts, application of the *Chevron* doctrine implicates special doctrinal issues, such as the effect of the foreign affairs canons of construction, the scope of the President's independent lawmaking powers, and the domestic status of international law.

More generally, the *Chevron* doctrine offers a useful perspective for thinking about the relationship between the judicial and execu-

traditional judicial deference to the *executive branch* in foreign affairs." Koh, *supra* note 38, at 1848.

³³⁷ The lower courts may be moving in this direction in their application of the *Zschernig* preemption doctrine. In none of the three decisions applying this doctrine in the 1990s has a court purported to be deferring to the executive branch. See *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1998), cert. granted, 120 S. Ct. 525 (1999); *International Ass'n of Indep. Tank Owners v. Locke*, 148 F.3d 1053 (9th Cir. 1998), rev'd on other grounds sub. nom. *United States v. Locke*, 120 S. Ct. 1135 (2000); *Trojan Techs. v. Pennsylvania*, 916 F.2d 903, 913–14 (3d Cir. 1990).

tive branches in foreign affairs cases. Some of the value of this “*Chevron* perspective” comes simply from the fact that it provides a framework for understanding and limiting deference in this otherwise amorphous area. The *Chevron* perspective also focuses attention on delegation and thereby flushes out claims of Executive power that often lurk beneath the surface of arguments for deference. In addition, it focuses attention on the source of the law being interpreted, thereby highlighting, for example, differences in the domestic status of different types of international law. Finally, the *Chevron* perspective offers a middle-ground alternative to the extremes of judicial abdication and a pure *Marbury* “rule of law” approach. This is an attractive alternative because it imposes legal constraints on the executive branch while at the same time taking into account the realities of executive branch expertise and authority in foreign affairs, the difficulty of drawing a sharp line between foreign affairs law and foreign affairs policy, and the increasingly international nature of our administrative state.